STATEMENT OF THE CASE

THE ALLEGATIONS PERTAINING TO DEFENDANT MACAJOUX

On February 16, 2004, petitioner filed a complaint in the United States District Court, Eastern District of New York, against the named defendants, (App-D).

The complaint alleges that on August 22, 1991, petitioner was arrested and charged with an assault on one Thomas Drew. approximately 38 days later, petitioner was re-indicted for second degree murder upon the death of Mr. Drew, (App. D-6, 7, Paragraph 25). According to the complaint, it was fraudulent information given by defendant Macajoux to the Kings County District Attorney, as well as the grand jury which led to this murder indictment, (App. D-6, Par. 26).

Specifically, petitioner alleges that after conducting an autopsy on the body of Thomas Drew, Macajoux became aware that Mr. Drew did not succumb to any of the injuries related to the wounds alleged to have been inflicted by the assault, but instead form a pre-existing condition (chronic pericarditis) completely unrelated to his injuries from the assault. Further, the autopsy revealed that the other named physicians in the complaint misdiagnosed Mr. Drew's illness as pneumonia despite numerous s-rays revealing that his lungs were clear. (App. D-7, Par. 27).

The complaint further details that on October 7, 1991, defendant Macajoux went before a grand jury in Kings County New York and with knowledge that the information she provided would be relied on by not only the grand jury, but also the district attorney presenting the matter, knowingly stated that Thomas Drew, while in a hospital bed contracted bronco-pneumonia and pericarditis which caused his death. In making the fraudulent statements defendant Macajoux knowingly concealed that this was a pre-existing condition that could not be contributed to any of the alleged actions of the defendant, (App. D-7, paragraphs 28-29).

is alleged in the complaint that defendant Macajoux's fraudulent misrepresentations and omissions before this grand jury caused petitioner to subsequently be indicted for second degree

murder, (N.Y. Penal Law 125.25 (1), App. D-7, 8 Par. 29). Further defendant had a fiduciary duty not only to the petitioner but to the public at large to provide truthful information when summoned before investigative bodies such as the grand jury. Her deliberate misrepresentations and omissions before this body served to undermine the integrity thereof. (App. D-8, Paragraphs 31-37).

Petitioner further alleged in the complaint that in furtherance of these fraudulent misrepresentations before the grand jury, defendant Macajoux on February 16, 1993, at petitioner's first trial, then again on March 30, 1993, gave the same fraudulent information and omissions as before mentioned, that Thomas Drew lay in the hospital bed and contracted pericarditis-pneumonia as a result of the gunshot wound, (App. D-8, paragraphs 38-40, 49).

THE ALLEGATIONS PERTAINING TO THE OTHER NAMED DEFENDANTS EXCEPT INVESTIGATOR HAROLD HAHN

It is alleged in the complaint that these physicians provided various treatments to the deceased either collectively or at times individually misdiagnosed the underlying pre-existing condition that led to Mr. Drew's death, (App. D-10-D-16). Despite these various doctors performing numerous tests and procedures on Mr. Drew, they either collectively or individually failed to perform the required treatments which these actions or inactions by these physicians ultimately led to his death.

Upon review of the autopsy report prepared by defendant Macajoux, the complaint alleges, it was discovered by these physicians that Mr. Drew died as a result of a pre-existing condition chronic pericarditis, (App. D-15, Par. 58). Aware of these findings, these physicians it is alleged then failed to come forward and report the true cause of Mr. Drew's death, either during the grand jury proceedings or at either trial.

THE ALLEGATIONS PERTAINING TO HAROLD HAHN

According to the complaint, in his capacity as medical legal advisor, Dr. Hahn was responsible for investigating the cause of death of Thomas Drew. As he was a specialist in forensic medicine, his duty was to advise the district attorney on the cause of death. It is alleged that after interviews with the named physicians, review of the autopsy report, as well as review of the consultation notes dated September 16, 1991, and September 17, 1991, Dr. Hahn knew or should have known that Mr. Drew did not lay in Kings County hospital and contract pericarditis-pneumonia, (App. D-13 Par. 53).

Subsequently, investigator Hahn knowingly, willfully and intentionally conspired with the other named defendants not to come forward with the fact that Mr. Drew died from a pre-existing condition, despite his fiduciary duty to do so. (App. D-14 paragraphs 55-56).

PROCEDURAL HISTORY

After petitioner paid the initial filing fee and served the complaint on the named defendants, the United States District Court, Eastern District of New York, (Hon. Edward R. Korman)(, under the provisions contained in 28 U.S.C. 1915(a), granting the court authority to initially screen prisoner complaints, dismissed petitioner's complaint. That court in it's decision ruled that petitioner's complaint was legally insufficient as it is foreclosed by the holding of Heck v. Humphrey, 512 U.S. 477 (1994), (App. A-6).

The Court further held that petitioner's claims appeared to be time-barred, ruling that in New York, Federal Courts apply a three year statute of limitations period to § 1983 claims. Citing Owens v. Okure, 488 U.S. 235, 251, and various second circuit court of appeals's decisions the court reasoned that the statute of limitations period begins to run from the date on which "the plaintiff knows or has reason to know of the injury which is the basis for the action." (App. A-7).

In conclusion, the court dismissed the complaint for failure to state a claim on which relief could be granted pursuant to 28 U.S.C.

1915(a), (b). The court further certified pursuant to 28 U.S.C. 1915(a), (3), that any appeal would not be taken in good faith. (App. A-8).

Defendant timely thereafter filed an appeal with the Second Circuit Court of Appeals, (App. B). Relevant to this application for certiorari, petitioner presented the issues of whether it was error for the district court to bar petitioner's complaint under the holding of Heck v. Humphrey, whether it was error for the district court to bar the complaint under a three year statute of limitations period and whether it was error for the district court to initially screen petitioner's complaint under the provisions contained in U.S.C. 1915(a). (App. B-1, B-23-24).

Upon docketing of petitioner's appeal the Second Circuit Court added the New York State Attorney General's Office as counsel for the defendants. By letter dated May 10, 2004, the attorney general's office advised the court that it would be unable to represent these defendants as there were no state parties in the appeal. (App. C-3).

By letter dated October 15, 2004, the Office of the Corporation Counsel of the City of New York submitted a memorandum stressing reliance on the district court's decision. (App. C-1-2).

Thereafter, petitioner received a letter from the pro-se clerk of the circuit court with enclosed forms for the scheduling of oral argument on March 17, 2005, by video conference. Despite petitioner timely returning the enclosed forms, petitioner was not produced for this oral argument. (App. C-4).

By summery order dated March 28, 2005, the Second Circuit Court of Appeals affirmed the district court's decision dismissing petitioner's complaint, (App. A-1-3). As the district court ruled, the second circuit held that petitioner's complaint was foreclosed by Heck v. Humphrey. For the reasons clarified in the remainder of this petition, dismissal of petitioner's complaint is contrary to established Supreme Court precedent ant violates petitioner's equal protection rights and the rights of all those similarly situated and must be reversed.

REASON FOR GRANTING THE PETITION

POINT 1: THE UNITED STATES SECOND CIRCUIT COURT'S SUMMARY ORDER AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT IS CONTRARY TO AN IN CONFLICT WITH THE UNITED STATES SUPREME COURT'S HOLDING IN CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTER-HOUSE CO. V. BUTCHERS' UNION SLAUGHTER-HOUSE & LIVE-STOCK LANDING CO., AND IS NOT FORECLOSED BY THE HOLDING OF HECK V. HUMPHREY.

It is axiomatic that the District Court, as petitioner was proceeding pro-se, was obliged to construe his complaint liberally, particularly as they alleged civil rights violations, McEachin v. Mcguinnis, 357 F. 3d 197, 200, (2nd Cir. 2004), citing Weistein v. Albright, 261 F. 3d 127, 130 (2nd Cir 1999). Moreover, the court must interpret the petitioner's complaint as raising the strongest arguments they suggest, (see McPherson v. Coombe, 174 F. 3d 276, 280, (2nd Cir. 1999), and accept as true all allegations of material fact and construe then in the light most favorable to the petitioner, (Gomez v. USSA Federal Savings Bank, 171 F. 3d 794, 795-96, (2nd Cir. 1999).

In his complaint against the named defendants, petitioner alleged fraud. Specifically, against defendant Macajoux, he alleges that after conducting an autopsy on the deceased Thomas Drew, she correctly reduced her findings to an autopsy report that Mr. Drew died from pericarditis, (App. D-7 par. 27). However at a Kings County Grand Jury proceeding, Macajoux fraudulently omitted that the pericarditis that Drew died succumbed to was pre-existing and was in no was related to the gunshot wound alleged to have been inflicted by petitioner, (App. D-7 par. 28).

It is alleged further that it was known or should have been known by Macajoux, that the other named defendants, (excluding def. Hahn), misdiagnosed pericarditis for pneumonia, and the subsequent treatment for that, or lack of treatment for his actual ailment may have

indeed become a contributing factor in his subsequent death, (App.. D-11 par. 44).

Against defendant Hahn it is alleged that being entrusted with the duty of investigating the death of Mr. Drew and reporting his to the Kings County District Attorney's Office defendant Hahn knew or should have known that the deceased did not die as a result of the gunshot wound. Despite having a fiduciary duty, defendant Hahn failed to come forward with the true cause of Mr. Drew's death, (App. D-13-14 paragraphs 53-54).

These allegations further outline that the Kings County District Attorney as well as a grand jury, where defendant Macajoux personally testified, relied on these fraudulent omissions to first seek and ultimately return an indictment against petitioner, (App.. D-9 paragraphs 37-38). Defendant Macajoux thereafter repeated these fraudulent omissions at two trials held against petitioner who was ultimately convicted of murder.

The district court as well as the court of appeals in affirming the district court's dismissal of petitioner's complaint for failure to sate a claim relied on the Supreme Court's holding of Heck v. Humphrey, 512 U.S. 477 91994). Particularly the court provided the following language from Heck to characterize petitioner's claims:

> In order to recover damages for (an) allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. Heck id. At 486-487, quotations omitted, underlines added).

However, the allegations contained in petitioner's complaint are not controlled by this holding in Heck. Indeed, upon the initial filing of the complaint and based upon the allegations contained therein, the United States Supreme Court decision Crescent City Live-Stock Landing $ Slaughter House Co. V. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U.S. 141 (1887, App. E), was controlling law on whether petitioner should have been allowed to proceed forward with his complaint.

An analysis of Heck reveals that at it's core, Heck prohibits a prisoner, using U.S.C. § 1983 as a vehicle, undermine a criminal conviction having been rendered by a criminal court having proper jurisdiction over the subject matter and defendant. This precludes the possibility of a claimant having parallel litigations over the issues of probable cause and guilt or creating two conflicting resolutions arising from the same transaction, Heck id. At 484). The foundation being malicious prosecution, a plaintiff, consistent with Heck must first allege in his complaint, that a criminal prosecution has terminated in his favor.

However, the majority in Heck also recognized that not every constitutional violation alleged, that arises out of a criminal conviction would necessarily call into question the validity of that conviction. For example Heck does not bar all § 1983 unreasonable search claims, notwithstanding the subsequent criminal conviction, (id. At 487, fn. 7), nor does it bar using § 1983 for an abuse of process claim (id. At 486, fn. 5). The reasoning behind these exceptions being that neither issue directly calls into question the issue of probable cause.

Moreover the Heck, court realized that it was possible for a complaint to rebut the issue of probable, the foundation of Heck, in cases alleging Fraud, perjury, or mistake of law (id. At 484, fn. 4, citing Burt v. Place, 4 Wend. 591, N.Y. 1(1830), Witham v. Gowen, 14 Me. 362 (1837).

This issue of probable cause, and how much weight shall be attributed to the judgment of the court in the original action is directly controlled by the Supreme Court's holding in Crescent City supra. This case, long ago decided, has never been abrogated by any statute or subsequently decided cases. It reasoned in relevant parts on the issue of probable cause and more importantly on that issue when a

prior court ruling may bar a suit that:

> 'The principle settled in the case last cited we understand to be that such a judgment will not, in every possible state of case, be deemed to be conclusive of the question of probable cause, but that, like judgments in other cases, it's effect may be destroyed by showing that it was procured by fraud or other undue means." Crescent City id. At 150, citing old English authorities)
>
> -Further-
>
> "Unless other matters be relied upon to impeach the judgment or decree, and show that it was obtained by fraud, and, in that case, it is indispensable that such matter should be alleged in the plaintiffs declarations, for unless it be done, as the other facts which have to be stated establish the existence of probable cause, the declaration is suicidal." (Supra. Quotations added).

This reasoning is sound logically because with the particularity (St a fraud claim must be pleaded initially, a fraud claim allows the court to determine whether based on the allegations, if proven, the presumption of probable cause has been rebutted.

It is not in dispute that petitioner's complaint alleges fraud. Nowhere in the complaint is the validity of his conviction, as respected to the court, called into question. For based on the fraudulent omissions of these defendants the court was required to proceed. In fact it was their reliance on the fraud and the omission by the named defendants that ultimately led to the injury to petitioner.

Finally it is important that this court not permit these

defendants and the lower courts to use Heck's holding as a shield of immunity from a meritorious civil claim. The acts and omissions alleged in petitioner's complaint satisfy each and every element of fraud. A successful judgment in petitioner's favor in no way undermines the validity of his conviction and if it does so be it. For the allegations of fraud committed by these defendants, if proven, would render his judgment a nullity having no cause to be initiated against petitioner form the start and they should no be held responsible for the resulting injury. To allow these defendant to shield themselves from liability under the guise of Heck would violate plaintiff's equal protection rights and is fundamentally unfair. For these reasons the writ should be granted.

POINT 2: THE DISTRICT COURT AND THE SECOND CIRCUIT COURT OF APPEALS IN AFFIRMING DISMISSAL OF PETITIONER'S COMPLAINT ERRED WHEN IT DETERMINED THAT THE DEFENDANTS WERE GOVERNMENT OFFICIALS OR ENTITIES ALLOWING INITIAL SCREENING OF THE COMPLAINT UNDER 28 U.S.C 1915A AND CONTRARY TO THE SUPREME COURT'S HOLDING IN MONELL V. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK et al., 436 U.S. 658.

Under 28 U.S.C. 1915A, a district court must screen prisoners civil complaints against government officials or entities. In pertinent part, § 1915A provides:

> Screening - The court shall review, before docketing, if feasible or, in any event as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a government entity. (28 U.S.C. 1915A, Carr v. Dvorin, 171 F. 3d 115, (2nd Cir. 1999).

Additionally under two other statutory provisions contained within 28 U.S.C. 19159(e)(2) and 42 U.S.C. 1997e, the court is granted authority to initially screen complaints where a prisoner seeks to proceed in forma paupis, or his complaint is challenging prison conditions.

Thus, as the court premised it's authority to initially screen petitioner's complaint under 28 U.S.C. 1915A, (App. A-5). The question to be resolved is whether the defendants named in the complaint fall within the scope of government officials.

First, upon the docketing of the complaint at the Second Circuit Court of Appeals, that court's clerk added the New York State

Attorney General's Office as attorneys for the defendants. Upon receiving notification of this the Attorney General responded by informing the court that they were unable to represent the defendants because there were no state parties involved in the appeal. Further the letter explained:

> "The defendant-appellees in this case are an employee of the Chief Medical Examiner of New York City; Kings County Hospital; and certain physicians who are apparently on the staff of the hospital. Therefore, I suggest that you contact the Office of the Corporation Counsel of the City of New York, and hospital, to ascertain whether they wish to appear in this appeal. Also please remove Attorney General Spitzer from the docket sheet as counsel for the defendant-appellees. Thank you. (App. C-3)

Under New York Executive Law § 63 (App. E-9), the attorney general is required to represent government employees whose actions within their employment expose them to civil liability. Therefore it is clear form this letter, that the State of New York recognized that these defendants are not immunized with government protection.

Secondly, in Monell v. Dept. Of Soc. Serv. Of City of N.Y., 436 U.S. 658 at 690, it was established that local government (if it is deemed that this suit directs liability at either the Kings County Medical Examiner's Office or Kings County Hospital), are included as persons to whom § 1983 claims apply. They are legally separate entities from the state and nowhere in the District Court of Court of Appeal's decision is any authorities cited establishing their standing as government officials.

Indeed, this is in fact a diversity action between citizens of the same state, granting jurisdiction to the federal courts in a § 1983 action upon alleged deprivation of petitioner's constitutional rights. As such

the matter should have been allowed to proceed forward upon the filing of petitioner's complaint without screening from the court as petitioner paid the initial filing fee as properly served the defendants.

Finally and perhaps most importantly, this erroneous determination by he courts that these named defendants were government officials made it possible for the courts to construe the complaint as one for malicious prosecution. Petitioner sues these defendants for actions and omissions they undertook outside the knowledge of governmental agencies who then relied upon this fraud causing injury to petitioner. As such it would be proper for the government to join petitioner against these defendants or take subsequent action against them after a successful judgment by petitioner.

Because the lower court's ruling is in conflict with 28 U.S.C. 1915A and contrary to Supreme Court holdings a writ of certiorari should be granted.

POINT 3: THE THREE YEAR STATUTE OF LIMITATIONS PERIOD FOR MALICIOUS PROSECUTION WAS INAPPLICABLE TO PETITIONER'S COMPLAINT AS HE WAS ALLEGING FRAUD IN HIS COMPLAINT THUS THE DETERMINATION THAT HIS COMPLAINT WAS TIME-BARRED WAS ERROR.

The lower courts erred when it ruled that petitioner's complaint should be dismissed as being time-barred under a three year statute of limitations period (App. A-2, A-7). New York Law determines that applicable statute of limitations, federal law determines when the tolling of this period begins, (see Covington v. City of New York, 171 F. 3d 117, 121, (2nd Cir. 1999), citing Morse v. University of Vt., 973 F. 2d 122, 125 (2nd Cir. 1992).

Under New York C.P.L.R. § 213(8), (App. E-9), fraud claims are to be commenced within six years of the fraudulent actions or two years after discovery, whichever is longer.

Under federal law the limitations period begins to run when the plaintiff has actual knowledge of the alleged fraud or knowledge of facts which in exercise of reasonable diligence should have led to actual knowledge, (Stull v. Bayard, 561 F. 2d 429).

In his complaint, petitioner alleged that he discovered the fraud after research and gaining information from various medical authorities on June 9, 2003. This date, construing all allegation in the complaint as true, is well within either limitations period. More importantly this presents a question of fact to be resolved by a jury.

Finally the statute of limitations, or the assertion that the complaint is untimely, must be raised as an affirmative defense by the defendants initially and then disproved by plaintiff before a jury. It was error for the court to resolve this question before the parties presented any proof. For these reasons reversal is warranted and the writ of certiorari should be granted.

CONCLUSION

Simply stated this case must be reversed. This petitioner alleges that the fraudulent acts and omissions by these named defendants caused him to be indicted for a crime that he was not responsible. They relayed these fraudulent findings to the district attorney and a grand jury with full knowledge that they would be relied upon and cause injury to this petitioner. They now must be held accountable, and as such the case must be remanded so petitioner may have his day in court. Stare decisis as well as fundamental fairness and due process demands this. For these reasons the petition should be granted.

Respectfully submitted,

_____

William Montgomery

Dated: 6-3-05

APPENDIX-A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RESJUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th day of March, two thousand and five.

Present: HON. JON O. NEWMAN,
HON. RICHARD C. WESLEY,
HON. PETER W. HALL,
Circuit Judges.

WILLIAM MONTGOMERY,

Plaintiff-Appellant,

APPENDIX-A
MARIE MACAJOUX, OFFICE OF THE CHIEF MEDICAL EXAMINER
N.Y. CITY, KINGS COUNTY HOSPITAL, PEPEI DAKOU, DR., TUDOR, DR.,
JOHNSON, DR., THOMAS SCALEA, M.D., SHIH, DR., ADLER, DR.,
KLIEN, DR., ELLOWITZ, DR., KOTZEN, DR., KELLY, DR., CHIN, DR.,
SHELBY, DR., SAMUEL, DR., KRAUS, DR., VERTIL, DR., MCRAE,
DR., HAHN, INVESTIGATOR,

Defendants-Appellees.

For Plaintiff-Appellant: WILLIAM MONTGOMERY pro se, Attica, New York (on submission).

For Defendants-Appellees: RONALD R. STERNEBERG Senior Assistant Corporation Counsel of the City of New York New York, New York (on submission).

Appeal from the United States District Court for the Eastern District of New York
(Korman, Chief Judge).

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UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be **AFFIRMED**.

William Montgomery appeals the district court's dismissal of his complaint under 28 U.S.C. § 1915A(b). The court held Montgomery's claims were barred by Heck v. Humphrey, 512 U.S. 477 (1994), and, in the alternative, the relevant statutes of limitations. Applying de novo review, see Liner v. Goord, 196 F. 3d 132, 134 (2d Cir. 1999), we affirm.

Montgomery raises three main arguments on appeal. First, he claims that § 1915A does not apply because he paid a filing fee. However, § 1915A "appl[ies] to all civil complaints brought by prisoners against governmental officials or entities regardless of whether the prisoner has paid [a] filing fee." Carr v. Dvorin, 171 F. 3d 115, 116 (2d Cir. 1999) (per curiam). Second, Montgomery contends that Heck does not apply because his complaint does not allege malicious prosecution. The principle of Heck, however, applies equally to Montogomery's claims because "a judgement in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Heck, 5123 U.S. at 487; see Channer v. Mitchell, 43 F. 3d 786, 787 (2d Cir. 1994) (per curiam). Finally, Montogomery argues that the district court erred in finding his claims time-barred. Although this question is moot in light of the applicability of Heck, we agree with the district court's conclusion and reasoning. We find the remainder of Montgomery's arguments lack merit.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

For the Court
Roseann B. Mackechnie, Clerk
"S/_____".

APPENDIX-A
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

WILLIAM MONTGOMERY,
Plaintiff,

MEMORANDUM AND ORDER
04-CV-0892(ERK)

-against-

OFFICE OF THE CHIEF MEDICAL EXAMINER N.Y. CITY MARIE MACAJOUX; KINGS COUNTY HOSPITAL; DR. PEPI DAKOU; DR. TUDOR; DR. JOHNSON; THOMAS SCALEA, M.D.; DR. SHIH; DR. ADLER; DR. KLIEN; DR. ELLOWITZ; DR. KOTZEN; DR. KELLY; DR. CHIN; DR. SHELBY; DR. SAMUEL; DR. KRAUS; DR. VERTIL; DR. McCRAE; INVESTIGATOR HAHN;

Defendants.

KORMAN, Ch.J.

Plaintiff William Montgomery, a prisoner incarcerated at Attica Correctional Facility, brings this action prose pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, alleging that defendants violated his civil rights. Plaintiff has paid the filing fee to commence this action. Plaintiff seeks inductive and monetary relief. The Court dismisses the complaint for the reasons set forth below.[1]

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[1]Plaintiff also submits an application to proceed in forma pauperis (IFP). As plaintiff has already paid the filing fee and this Court dismisses the instant complaint, plaintiff's IFP application is therefore moot.

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BACKGROUND

On August 22, 1991, plaintiff was arrested and charged with assault on Thomas Drew. Compl. Paragraph 24. Drew died while hospitalized at Kings County Hospital, and plaintiff was then recharged and indicted for murder in the second degree. Id. Paragraphs 25-25. Plaintiff alleges that on June 9, 2003, after "extensive research through well established medical institutions," id. Paragraph 1, he discovered that the Chief Medical Examiner and doctors who treated Drew at Kings County Hospital conspired to secure plaintiff's conviction by falsifying Drew's autopsy report and providing false testimony during plaintiff's trial. Plaintiff alleges that defendant Macajoux, who performed an autopsy on Drew on October 1, 1991, "made false or misleading statements regarding the existence of a 'pre-existing' medical condition" which caused Drew's death. Id. Paragraph 28. According to plaintiff, "the Grand Jury relied upon [the] medical examiner['s] fraudulent misrepresentation of a material existing fact, and imp[ro]per concealment of material fact... which led to plaintiff being indicted with murder in the 2nd degree ... which violated plaintiff's due process rights." Id. Paragraph 31. Plaintiff alleges that Dre's death was actually caused by medical malpractice at Kings County Hospital, and that defendants "conspired to violate plaintiff's rights" by falsifying medical records and providing false testimony at plaintiff's trial in order to deflect blame from themselves. Id. Paragraph 45. Plaintiff seeks $15,000,000 from each defendant.

STANDARD OF REVIEW

Under 28 U.S.C. § 1915A, this Court has the authority to review a prisoner's complaint in order to identify any cognizable claims or dismiss the complaint, or any portion thereof, if it: (1) is frivolous, malicious or fails to state a claim upon which relief

may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief. As plaintiff is proceeding pro se, this Court is obliged to construe his pleadings liberally, particularly as they allege civil rights violations. McEachin v. McGuinnis, 357 F. 3d 197, 200 (2004) (citing Weinstein v. Albright, 261 F. 3d 127, 132 (2d Cir. 2001)). Thus, this Court must interpret plaintiff's pleadings as raising the strongest arguments they suggest. See *Corcoran* v. *New York Power Auth.*, 202 F. 3d 530, 536 (2d Cir. 1999), cert. Denied, 529 U.S. 1109 (2000); McPherson v. Coombe, 174 F. 3d 276, 280 92d Cir. 1999); *Burgos* v. *Hopkings*, 14 F. 3d 787, 790 (2d Cir. 1994).

DISCUSSION

A. Plaintiff's Complaint is Barred under Heck

Plaintiff's § 1983 claim is legally insufficient as it is foreclosed by Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court held that:

> [I] n order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Id. at 486-87. The underlying basis for the holding in Heck, is

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"That civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." Id. at 486. The principles to § 1983 actions "that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." Id. The gravamen of plaintiff's complaint is that defendants presented perjurious testimony and false evidence at his trial which led to his conviction for murder in the second degree. Plaintiff's claim directly calls into question the validity of his conviction and sentence.[2] As plaintiff has not alleged that his conviction has been independently invalidated, his § 1983 claim is dismissed under Heck. See Channer v. Mitchell, 43 F. 3d 786, 787 (2d Cir. 1994) (plaintiff's § 1983 perjury claim against defendants dismissed under Heck, because, "if proven, would have rendered [his] conviction invalid")' Duamutef v. Morris, 956 F. Supp. 1112, 1116 (S.D.N.Y. 1997) ("[p]laintiff's claim[] of ... perjured testimony perhaps most directly call[s] into question the validity of his conviction and sentence"). 28 U.S.C. § 1915A(b).

Furthermore, heck applies to plaintiff's conspiracy claims under §§ 1985(3) and 1986 as well. Amaker v. Weiner, 179 F. 3d 48, 51-52 (2d Cir. 1999) (Deciding conspiracy claim would call into question the validity of the underlying conviction which is barred by Heck). Therefore, plaintiff's claims that defendants conspired to obtain his conviction and sentence are

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2

The Court takes judicial notice that plaintiff was convicted on April 20, 1993, the Appellate Division affirmed the conviction on June 5, 1995, and the New York State Court of Appeals denied plaintiff leave to appeal on August 17, 1995. See People v. Montgomery, 216 A.D. 2d 332 (2d Dep't 1995); People v. Montgomery, 86 N.Y. 2d 798 (1995).

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also dismissed. Id. (citations omitted). 28 U.S.C. § 1915A(b).

B. Statute of Limitations

In any event, plaintiffs claims appear to be time-barred. In New York, federal courts apply a three-year statute of limitations period to § 1983 claims. Owens v. Okure, 488 U.S. 235, 251 (1989); Harris v. City of New York, 186 F. 3d 243, 248 (2d Cir. 1999); Tapia-Ortiz v. Doe, 171 F. 3d 150, 151 92d Cir. 1999). Federal law determines when the limitations period begins to accrue. Zahorgy v. New York State Dep't of Educ., 131 F. 3d 326, 331 (2d Cir. 1997). Under federal law, the statute of limitations begins to run from the date on which "the plaintiff knows or has reason to know of the injury which is the basis of his action." Pinaud v. County of Suffolk, 52 F. 3d 1139, 1156 92d Cir. 1995) (internal quotation omitted). A plaintiff has reason to know of the basis for the cause of action when by the exercise of reasonable diligence it should have been discovered. See id. At 1157.

Here, the actions plaintiff complains of occurred from the time of his arrest in 1991 to the time of his criminal trial in 1993; plaintiff filed the instant action more than ten years after these events occurred. Thus, his claim is time-barred unless the limitations period was tolled. Plaintiff alleges that he discovered defendants' wrongdoing on June 9, 2003, after researching "through well established medical institutions." compl. paragraph 1. However, plaintiff's research does not serve to toll the limitations period. Plaintiff, exercising reasonable diligence, could have contacted medical institutions and conducted research within the three-year limitations period. See Pinaud, 52 F. 3d at 1157. Therefore, plaintiff's complaint is also dismissed as time-barred.

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CONCLUSION

Accordingly, the complaint is dismissed for failure to state a claim on which relief may be granted pursuant to 28 U.S.C. § 1915(A)(b). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore in forma pauperis status is denied for purpose of an appeal. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

"S/_____
Edward R. Korman
United States District Judge

Dated: Brooklyn, New York
, 2004

APPENDIX-A
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

WILLIAM MONTGOMERY,
Plaintiff,

CIVIL JUDGMENT
04-CV-0892(ERK)

-against-

OFFICE OF THE CHIEF MEDICAL EXAMINER N.Y. CITY MARIE MACAJOUX; KINGS COUNTY HOSPITAL; DR. PEPI DAKOU; DR. TUDOR; DR. JOHNSON; THOMAS SCALEA, M.D.; DR. SHIH; DR. ADLER; DR. KLIEN; DR. ELLOWITZ; DR. KOTZEN; DR. KELLY; DR. CHIN; DR. SHELBY; DR. SAMUEL; DR. KRAUS; DR. VERTIL; DR. McCRAE; INVESTIGATOR HAHN;
Defendants.

Pursuant to the order issued 3/25/04 by the Honorable Edward R. Korman dismissing the complaint, it is

ORDERED, ADJUDGED AND DECREED: That the complaint is hereby dismissed pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore in forma pauperis status is denied for purpose of an appeal.

"S/_____"
Edward R. Korman
United States District Judge

Dated: Brooklyn, New York 3/25/04

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____.

APPENDIX-B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM MONTGOMERRY
Plaintiff-Appellant

AN APPEAL

04-2007-PR
-against- 04-CV-0892 (EKR)

OFFICE OF THE CHIEF MEDICAL
EXAMINER N.Y. CITY: MARIE MACAJOUX,
KINGS COUNTY HOSPITAL: Dr. PEPI DAKOU
Dr. TUDOR, Dr. JOHNSON,
Dr. THOMAS SCALEA, M.D., Dr. SHIH,
Dr. ADLER, Dr. KLIEN,
Dr. ELLOWITZ, Dr. KOTZEN,
Dr. KELLY, Dr. Dr. CHIN, Dr. SHELBY,
Dr. SAMUEL, Dr. KRAUS,
Dr. VERTIL, Dr. McRAE
Dr. MCRAE, INVESTIGATOR HAHN.
Defendants.

BRIEF FOR PLAINTIFF-APPELLANT, PRO-SE
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(1) The District Court erred in making factual determination, and dismissing plaintiff's complaint under 28 U.S.C. 1915(A)(B) because plaintiff had paid the full filing fee, and served upon the defendants Summons and Complaint.

A. The District Court erred in making factual determination that plaintiff's complaint was premised upon a claim for unjust perjured testimony, and dismissing pursuant to 28 U.S.C. Sec. 1915 (A)(B)

B. The District Court erred when it barred plaintiff's complaint under Heck v. Hamphrey, and dismissing pursuant to 28 U.S.C. Sec. 1915(A)(B).

C. The District Court erred when it barred plaintiff's complaint under New York three-year limitation period.

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JURISDICTION

Jurisdiction was originally vested in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. Sec. 1331A and 1343, 42 U.S.C. Sec. 1985 (2)(3), 42 U.S.C. 1983, 42 U.S.C. Sec 1986, in constitutional violations of plaintiff's 5th, 6th and 14th Amendment Rights. This matter in controversial exceeds the sum of $10,000.00 and is between citizens of the same State., New York State. On March 30, 2004, the District Court entered a judgment in this matter dismissing plaintiff's complaint.

Plaintiff William Montgomery timely filed, on April 2004, Notice of Appeal.

Jurisdiction is vested in the Court pursuant to 28 U.S.C. 1291 because this is an appeal from final decision of the United States District Court for the Eastern District of New York.

ISSUES PRESENTED

(II) **WHETHER IT WAS ERROR FOR THE DISTRICT COURT TO MAKE FACTUAL DETERMINATION AND DISMISSING PLAINTIFF'S COMPLAINT UNDER 28 U.S.C. SEC. 1915 (A)(B) AFTER PLAINTIFF PAID THE FULL FILING FEE, AND SERVED UPON DEFENDANTS SUMMONS AND COMPLAINT.**

(II) **WHETHER IT WAS ERROR FOR THE DISTRICT COURT TO MAKE FACTUAL DETERMINATION THAT PLAINTIFF'S COMPLAINT WAS PREMISED UPON A CLAIM OF UNJUST PERJURED TESTIMONY.**

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(II) WHETHER IT WAS ERROR FOR THE DISTRICT COURT TO BAR PLAINTIFF'S COMPLAINT UNDER HECK V. HUMPHREY.

(IV) WHETTER IT WAS ERROR FOR THE DISTRICT COURT TO BAR PLAINTIFF'S COMPLAINT UNDER THREE-YEAR LIMITATION PERIOD.

(V) WHETHER PLAINTIFF'S COMPLAINT STATE A VIABLE CLAIM WHICH RELIEF MAY BE GRANTED.

NATURE OF THE CASE

This is an appeal from a judgement of the United States District Court for the Eastern District of New York wherein the District Court (Judge Edward R. Korman) dismissing Plaintiff's complaint pursuant to 28 U.S.C. Sec. 1915(A)(B), and 28 U.S.C. Sec 1915(A)(3).

For the reasons set forth below, the District Court erred as a matter of law — in so ruling. The applicable law compels a refusal of the District Court's determination and the issuance of an Order remanding this case back to the District Court for further proceedings.

STATEMENT OF FACTS

On or about February 25, 2004, Plaintiff commenced the underlying action by a complaint upon the District Court for

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the Eastern District of New York, and by serving a Summons and Complaint upon all defendants joint appendix (App) (A-1, A-2, A-3, A-4, A-5) Attached services the complaint set forth six claims - three counts of fraud, one count of conspiracy to deprive access to justice and equal protection of the law in violation of 42 U.S.C. Sec. 1985(2). One count of neglect to prevent in violation of 42 U.S.C. Sec. 1986. One count of negligent misrepresentation, each arising out of essentially the same set of operative facts. These facts – detailed in the underlying complaint – are undisputed.

Plaintiff (William Montgomery) is confined at Attica Correctional Facility, located at box 149, Attica, New York 14011-0149., in the City of Attica, in the State of New York from August 10, 1993.

Plaintiff is, and was at all times mentioned herein, an adult citizen of the United States and resident of the State of New York. (App. A1, A2).

Medical examiner Marie Macajoux is, and was at all times relevant hereto, a medical examiner engaged in the practice of performing autopsy, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with her principle place of business as office Chief Medical Examiner at 520 First Avenue, New York, New York 10016.

Dr. Dakou is, and was at all times relevant hereto, a medical doctor engaged in the practice of providing medical attention to the citizen of New York and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or her" principle place of business at King County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Tudor is, and was at all times relevant hereto, a

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medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Doctor Johnson is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Scalea is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Adler is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Klien is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and

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belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Kotzen is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Samuel is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Shelby is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Shin is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States

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Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Kelly is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Straus is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Vertil is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. McRae is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New

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York 11203.

Dr. Ellowitz is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

Dr. Harold Hahn is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

This action arises under and is brought pursuant to 42 U.S.C. §§ 1983, 1985(2)(3), 42 U.S.C. § 1986, to remedy the deprivation, under color of State law, of rights guaranteed by the Fifth, Sixth and Fourteenth amendments of the United States Constitution. They are all sued in their individual and official capacities.

On August 22, 1991, plaintiff William Montgomery was arrested and charged with assault on Thomas Drew. However, thirty-eight (38) days later plaintiff was recharged and indicted for murder in the second degree. (App. A6, A7)

Statements and information provided by medical examiner Marie Macajoux during the period of Thomas Drew's hospitalization at Kings County Hospital, and relating to the cause of his death was the basis for the fraudulent indictment of murder in the second degree brought forth by the district attorney against the plaintiff. (App. A7, A8, A9, A10).

Medical examiner Marie Macajoux performed her

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autopsy upon Thomas Drew on October 1, 1991. Her autopsy report indicates "pre-existing" medical condition at the cardiovascular system. Moreover, Medical Examiner Marie Macajoux knew that the named "doctors" in this complaint misdiagnosed pericarditis for pneumonia, even though numerous x-rays revealed Thomas Drew's lungs were clear during his hospitalization.

On or about October 7, 1991, Medical Examiner Marie Macajoux stated to the Grand Jury in the County of Kings, and the district attorney that: "while in the hospital bed Thomas Drew became infected with bronco-pneumonia, and pericarditis which caused his death". Medical Examiner Marie Macajoux on behalf of the medical examiner's office knowingly made false or misleading statements regarding the existence of a "pre-existing" medical condition in relation to the health of Thomas Drew during his hospitalization at Kings County Hospital. Medical Examiner Macajoux knew and failed to disclose a material fact to the Grand Jury and District attorney in "that Thomas Drew had pericarditis, a medical condition pre-existing before he was admitted into Kings County Hospital". Furthermore, when Medical Examiner Macajoux performed her autopsy on Thomas Drew on October 1, 1991, her autopsy report indicated the "pre-existing" medical condition at the cardiovascular system.

Medical Examiner Macajoux was aware of the fact the district attorney, Grand jury, and plaintiff would accept the medical examiner's statement as true, and that the Grand Jury, plaintiff and District Attorney relied upon the fraudulent misrepresentation made by Medical Examiner Macajoux, regarding the medical condition of Thomas Drew while hospitalized.

Medical Examiner Marie Macajoux statement "that while Thomas Drew was hospitalized he became infected with bronco-pneumonia and pericarditis", this statement is inconsistent with medical examiner's autopsy report.

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Plaintiff, the prosecuting district attorney, and the Grand Jury relied upon medical examiner fraudulent misrepresentation of a material existing fact, and improper concealment of material fact as aforesaid by inter alia, accepting the Medical Examiner Macajoux's statement as true, which consequently lead to plaintiff being indicted with murder in the 2nd degree, by the Grand Jury, which violated plaintiff's due process rights.

Medical Examiner Marie Macajoux's fraudulent misrepresentation of pertinent material facts violate the plaintiff's core constitutional rights to due process and equal protection under the law. Medical Examiner Macajoux acted in an indifferent manner and in total disregard of the plaintiff's 14th Amendment rights to due process and equal protection under the law, and, 6th Amendment right to compulsory right. Medical Examiner Macajoux maliciously and intentionally misrepresented vital facts, causing plaintiff severe violation of his rights to a fair trial by the constitution of the United States. Medical Examiner Macajoux denied plaintiff the fiduciary duty owed to him by her.

Medical Examiner Macajoux's misrepresentation and concealment abut Thomas Drew's medical condition prior to, and during his hospitalization, and autopsy report affected not only the Grand Jury proceeding, district attorney, and plaintiff, but affected the public generally, and involves a gross departure from accepted and responsible behavior. Omission in the face of duty to disclose, violated plaintiff's federal constitution and due process rights.

The performance or results of any examination, or test, and moreover, refusal or failure to disclose and identify the nature of the very pertinent physical evidence; when there is reason to believe that there exist the likelihood of substantial harm to an individual or to the public interest: would violate the plaintiff's constitutional rights to due process of law.

A Grand Jury inquest is a body with investigative powers

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and inquisition. The scope of whose inquiries are not to be limited or interfered with by misleading information from any witness, especially one with a fiduciary duty (such as a Medical Examiner).

Medical Examiner Marie Macajoux do not exercise powers of peace officers, or exercise any other law enforcement powers and have no authority to bring charges against anyone, rather, she is a doctor qualified as pathology and corner. Therefore, when Medical Examiner Macajoux misled the district attorney, and Grand Jury, she violated the integrity of the Grand Jury proceedings itself. Also violated plaintiff's 5th Amendment right to due process, 6th Amendment right to compulsory rights, and 14th Amendment right to due process, and equal protection of the law.

The district attorney, and plaintiff relied upon Medical Examiner Marie Macajoux's false statement to their detriment. Plaintiff was forced to endure severe damages, as stated but no limited to: loss of income, loss of family, and mental anguish.

On February 16, 1993, Medical Examiner Marie Macajoux gave false, and misleading statement to plaintiff, trier-of-facts and district attorney at 360 Adam Street, Supreme Court, County of Kings. Medical Examiner Marie Macajoux stated "while in the hospital bed Thomas Drew became infected with bronco-pneumonia and pericarditis which caused his death". This statement is inconsistent with Medical Examiner's autopsy report, and all medical documentation made during Thomas Drew's hospitalization which she claimed to have read to help her determine the cause of death.

Medical Examiner Marie Macajoux, on Behalf of the medical examiner's office, knowingly made false statements regarding the existence of a 'pre-existing medical condition in relation to the health of Thomas Drew.

On February 19, 1993, Medical Examiner Marie Macajoux failed to disclose a material existing fact, "that

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Thomas Drew had" pericarditis, before he was admitted into Kings County Hospital". Furthermore, when Medical Examiner Macajoux performed an autopsy on Thomas Drew on October 1, 1991, her autopsy report revealed the pre-existing medical condition at the cardiovascular system. She also failed to disclose said information to the district attorney. Medical Examiner Macajoux was aware of the facts that the district attorney and plaintiff accepted her statements as true, and relied upon the fraudulent misrepresentation made by Medical Examiner Macajoux regarding the medical condition of Thomas Drew while being hospitalized.

Medical Examiner Macajoux misrepresentation of material existing fact violated plaintiff's constitutional rights and federally protected rights, as well as plaintiff's 5th Amendment right to due process of law, 6th Amendment right to compulsory right, and 14th Amendment right to due process and equal protection of the law. Medical Examiner Macajoux willfully and intentionally denied plaintiff the fiduciary duty owed to him.

Dr. Pepi Dakou, a neuro-surgeon, fraudulently and knowingly misrepresented a material existing fact in a written statement that was placed in evidence at plaintiff's trial at 360 Adam Street, Supreme Court, in the County of Kings on February 16, 1993, which states: "while being attended to at Kings County hospital, Thomas Drew developed "numerous pneumonia." Which resulted in renal failure (kidney). See, App. (A10, A11, A12).

Dr. Pepi Dakou was at the time the leading physician and had numerous tests ordered on "secretions" that were suctioned from Thomas Drew on the date he was admitted to Kings County Hospital. Furthermore, medical documentation will show that from August 23, 1991, the day Thomas Drew was admitted to Kings County Hospital through October 30, 1991, the date he expired, numerous tests were ordered on the "secretions" that was being suctioned from Thomas Drew.

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Based upon Dr. Pepi Dakou's position as the leading physician, medical documentation, tests-results, medical examiner's autopsy report, he knew that Thomas Drew did not lay in the hospital bed developed "numerous pneumonia" as he suggested in his written statement which was placed in evidence at plaintiff's trial on February 16, 1993.

Misrepresentation and intentional misrepresentation of a material existing fact benefitted Dr. Dakou, because Dr. Dakou and Kings County Hospital would be facing a lawsuit for malpractice from the family members of Thomas Drew. For argument sake, if Thomas Drew had "numerous pneumonia" as Dr. Dakou has suggested in his written statement, then it would be logical that Thomas Drew's lungs especially the bronchioles would became inflamed as they clogged with pus and mucus. Certainly they would not be clear as the medical documentation describes.

Based upon the contradictions between all consultation notes, medical documentation, medical examiner Marie Macajoux's autopsy report, and Dr. Pepi Dakou written statement, they conspired to violate plaintiff's constitutional rights, and saving Kings County Hospital, and the "Doctors" named in this complaint from a potential malpractice lawsuit from family members of Thomas Drew.

Dr. Dakou fraudulent misrepresentation of material existing facts violated plaintiff's constitutional rights and federally protected rights, as well as plaintiff's 5th Amendment rights to due process of law, 6th Amendment right to compulsory rights, and 14th Amendment rights to due process and equal protection of the law. Dr. Dakou willfully and intentionally denied plaintiff the fiduciary duty owed to him.

All medical documentation and autopsy report will show that Thomas Drew had an infection only at the cardiovascular system. Furthermore, medical documentation will show and prove that Thomas Drew's lungs were clear during his

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hospitalization at Kings County Hospital. Moreover, on September 16, 1991, and September 17, 1991, consultations was held to evaluate Thomas Drew's medical condition. These consultations notes described in details that Thomas Drew's lungs were clear, and that they (Doctors) underestimated Thomas Drew's bradycardia (EKGS) abnormalities. Dr. Dakou had access to these consultations notes and all medical documentation. When Thomas Drew was admitted to Kings County Hospital on August 23, 1991, medical documentation showed that Thomas Drew had an infection. These medical documents were available to Dr. Dakou. If the patient's lungs were clear as the "many " medical documents express, one can only conclude that the "numerous pneumonia" does not exist.

Plaintiff and district attorney relied upon Dr. Dakou's misrepresentation in a written statement to their detriment, causing plaintiff severe damages as stated but not limited to: loss of liberty, loss of family, loss of income, and mental anguish.

On March 30, 1993, Medical Examiner Marie Macajoux again stated to the plaintiff, second trier of facts, and district attorney that "while in the hospital bed Thomas Drew became infected with bronco-pneumonia and pericarditis which caused his death"/ this was done in furtherance of conspiracy, and the product of a corrupt conspiracy involving the intentionally and willfully obstruction of justice and conspiring with others to obstruct justice, and violate plaintiff's equal protection rights, and due process rights. Medical Examiner Macajoux denied plaintiff the fiduciary duty owed to him by her. (See, App. A12, A13).

Upon information and belief, Medical Examiner Marie Macajoux made said misrepresentations to plaintiff and the district attorney despite the fact that she knew said statements to be false. The district attorney, and plaintiff relied upon these false statements to their detriment, causing severe damages to plaintiff. Medical Examiner Marie Macajoux showed class based

bias toward "criminals". Based upon medical examiner Macajoux' oral statements, she believe "criminals" are not entitled to constitutional protection.

On March 30, 1993, Dr. Dakou's written statement was placed in evidence again in the County of Kings, Supreme Court, 360 Adam Street. (App. A13).

Upon information and belief, Medical Examiner Marie Macajoux, and Dr. Pepi Dakou made said misrepresentation of a material existing fact to plaintiff, and the district attorney despite the fact that they knew statements to be false. The defendants named in this complaint knew or reasonably should have known that Thomas Drew did not lay in the hospital bed and developed bronco-pneumonia and pericarditis. Medical documents, and medical examiner Marie Macajoux autopsy report will show that Thomas Drew had pericarditis when he was admitted to Kings County Hospital on August 23, 1993. The district attorney, and plaintiff relied upon these false statements to their detriments, plaintiff was forced to endure severe damages, as stated but not limited to: loss of liberty, loss of income, loss of family, and mental anguish.

Harold Hahn "Medico-Legal" investigated the cause of death of Thomas Drew while being hospitalized at Kings County Hospital. As a Medico-Legal: Investigation Harold Hahn specialized in "forensic medicine" the science which teaches the application of every branch of medical knowledge to the purposes of the law to enable a court of law to arrive at a proper conclusion on a contested question affecting life, or property. After investigator Harold Hahn interviewed the "Doctors" named in this complaint, Medical Examiner Marie Macajoux, and review the numerous medical documentation made during Thomas Drew's hospitalization, the medical examiner's autopsy report, and consultations notes dated September 16, 1991, and September 17, 1991, he knew or reasonably should have known that Thomas Drew did not lay in Kings County Hospital bed and

contracted pericarditis and numerous pneumonia. (App. A13, A14).

Investigator Harold Hahn by not coming forth with the truth about his findings after his investigation into the cause of death of Thomas Drew, he knowingly, willfully and intentionally conspired with Medical Examiner Marie Macajoux, and Dr. Pepi Dakou to violate Plaintiff's 5th Amendment right to due process of law, 6th Amendment right to compulsory right, and 14th Amendment right to due process and equal protection of the law. Investigator Harold Hahn willfully, and intentionally denied plaintiff the fiduciary duty owed to him.

Based upon all medical documentation, medical examiner's autopsy report, and consultation notes investigator Hahn conspired to violate plaintiff's constitutional rights. Investigator Hahn knew or reasonably should have known that the actions he took within his official responsibility would violate plaintiff's federally protected rights.

Dr. Thomas Scalea, the admitting physician, admitted Thomas Drew into Kings County Hospital on August 23, 1991, for a single gun shot wound. According to medical documents, dated August 23, 1991, Dr. Scalea ordered that Thomas Drew be suctioned for secretions and that the secretion be sent to a laboratory for analysis. Chest X-rays revealed pneumonia, however, lung fields showed both lung were clear on admission. This information was also given to Dr. Scalea. (App. A14, A15).

According to medical documents, numerous tests were ordered by defendants: Dr. Dakou, Dr. Scalea, Dr. Tudor, Dr. Johnson, Dr. Klien, Dr. Adler, and Dr. Kotzen on the different varieties of "secretions" that were collected on August 23, 1991, through September 30, 1991. The results of those test were reported to each of the above named defendants which indicated that Thomas Drew had a pre existing infection independent of the gun shot wound. Furthermore, while being suctioned,

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Thomas Drew displayed "Bradycardia", his EKGS showed abnormalities which indicated that something else constricting his normal heart function. This also was reported to each of the above named defendants, and documented in Thomas Drew's medical charts. However, medical chars indicated that no procedures were administered for his EKGS abnormalities.

On September 16, 1991, and September 17, 1991, consultations were held to evaluate the status of Thomas Drew's medical condition which included defendants: Dr. Chin, Dr. Shelby, Dr. Samuel Dr. Kelly, Dr. Vertil, Dr. Kraus, and Dr. McRaue. These consultations noted describe in detail that Thomas Drew's lungs were clear during Drew's hospitalization, and they "Doctors" underestimated Thomas Drew's bradycardia EKG's abnormalities. According to medical documentation the defendants named in this complaint knew nothing about Thomas Drew's pericarditis infection because they misdiagnose it for pneumonia because the bacteria it gave off were pneumonia symptoms. (App. A15, A16).

The aforementioned "Doctors" knew or reasonably should have known that the actions they took within their sphere of official responsibility by not coming forth with the truth about Thomas Drew's pre-existing medical condition independent of the gun shot wound would violate plaintiff's 5th Amendment right to due process of law, 6th Amendment right to compulsory rights, and 14th Amendment right to due process and equal protection of the law. These "Doctors" named in this complaint willing and intentionally denied plaintiff the fiduciary duty owed to him by them.

Based upon medical documentation, Medical Examiner Marie Macajoux's oral statement during Grand Jury proceedings, medical examiner's oral statements during trial on February 16, 1993, medical examiner's statement during plaintiff's second trial on March 30, 1993, medical tests, the results of those test, consultation notes, medical examiner Marie

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Macajoux's autopsy report, Dr. Dakou written statements, Investigator Harold Hahn's investigation. They conspired to violate plaintiff's constitutional rights. The remaining defendants by failing to give imputed notice to plaintiff or plaintiff attorney of record violated plaintiff's constitutional rights, because they had access to all medical documentation, medical test, the results of those tests, and consultation notes. They had imputed knowledge because the fact in question were open for their discovery, and neglect prevent the wrong. Based upon the aforemention, these "Doctors" showed class based bias toward criminals, and negligent misrepresentation.

SUMMARY ARGUMENT

The District Court erred in dismissing plaintiff's complaint pursuant to 28 U.S.C. Sec. 1915(A)(b) because plaintiff paid the full filing fee up front, and its determination must therefore be reversed. 28 U.S.C. Sec. 1915(A)(b) is not applicable to plaintiff's complaint because 28 U.S.C. Sec. 1915(A)(b) covers in forma pauperis proceeding since plaintiff paid the full filing fee up front plaintiff is exempt from 28 U.S.C. Sec. 1915(A)(b).

In addressing the first three counts of plaintiff's complaint causes of actions sounding in fraud - the District Court erred in three respects. Firs, it determined that the fraud claims was actually malicious prosecution claims which the court dismissed pursuant to 28 U.S.C. Sec. 1915(A)(b). Secondly, since the District Court disregarded the fact that plaintiff had paid the full filing fee up front. The District Court must grant or deny leave to proceed in forma pauperis with respect to all

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claims in the complaint 28 U.S.C. Sec. 1915.

In the complaint presented, the District Court remained silent to the first three counts of fraud in the complaint. (A16-A17). The District Court determined that the first three counts were actually malicious prosecution claims, and were barred under Heck v. Humphrey, 572 U.S. 477 (1994), and dismissed pursuant to 28 U.S.C. Sec. 1915(A)(b).

That notwithstanding, the plaintiff's assertions to the contrary his complaint was premised upon a claim of unjust perjurious testimony. Heck v. Humphrey is not applicable in a fraud claim, since fraud carries the elements (1) misrepresentation, concealment or nondisclosure of a material fact, (2) intent to deceive on part of defendant, (3) justifiable reliance upon misrepresentation by plaintiff, and (4) injury to the plaintiff as a result of such reliance.

Hecks's elements favorable termination of prior proceedings is not an element of a cause of action for fraud. In so deciding the District Court erred in falling to accept as true the allegations of the complaint, and failed to draw all possible inferences in plaintiff's favor. These failures – and the District Court's resulting legal determination – constitute fundamental errors compelling the reversal of its dismissal of plaintiff's complaint.

In addition, the District Court erred in dismissing plaintiff's claim for fraud because it improperly determined that New York limitation period for fraud carried a three years limitation period. Under New York law, there are two separately timed and alternative limitations periods in the case of a delayed discovery of fraud: Six years from accrual or two years from discovery, whichever is longer. CPLR N.Y. 213 Subd. 8, Federal Rule with respect to discovery of fraud is that the statute of limitations commences to run when plaintiff has actual knowledge of the alleged fraud of knowledge of facts which is exercise of reasonable diligence, should have led to actual

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knowledge. The court took judicial notice that plaintiff was convicted on April 20, 1993, the appellate affirmed his conviction of June 5, 1995, however, the court failed to take judicial notice that on October 16, 1995, plaintiff's motion for writ of error coram nobis was denied on November 29, 1995. The Court of Appeals denied his certificate of appeal on September 5, 1997. Plaintiff filed a petition pursuant to 28 U.S.C. 2254 which was denied by Judge Edward R. Korman on February 19, 1998. On January 14, 1999, the United States Court of Appeals denied plaintiff's certificate of appealability. Plaintiff contend that he is well within the applicable time limitations.

In addressing, fourth, fifth, and six claims of plaintiff's complaint – a cause of action for conspiracy to deprive access to justice and equal protection of the law in violation of 42 U.S.C. Sec 1985(2). Neglect to prevent in violation of 42 U.S.C. Sec. 1986, and negligent misrepresentation. District Court must grant or deny leave to proceed in forma pauperis with respect to all claims in the complaint 28 U.S.C. Sec. 1915. Here, the District Court remained silent to the fourth and fifth claim of the complaint. It again improperly and prematurely determined factual issues contrary to the allegations contained in the complaint. Specifically, to determined that 42 U.S.C. Sec. 1985(2) is actually 42 U.S.C. Sec. 1985(3). Having premised its dismissal upon a faulty characterization of plaintiff's complaint, the District Court's decision must, by its own account, be reversed.

However, plaintiff agree with New York State Attorney General characterization that this is not a molicious prosecution claim because the attorney general stated: "there is no state party in this appeal, we are unable to appear as counsel in this appeal (App 22)". The court could have characterize plaintiff's complaint as an abuse of process claim.

Finally, the District Court erred when it became the

defense attorney for the defendants after plaintiff had paid the full filing fee on filing of the complaint, and served all the defendants with Summons and Complaint. The District Court should have allowed the defendants named in the complaint to answer the complaint since plaintiff had paid the full filing fee, and served the defendants with Summons and Complaint the District Court erred by dismissing plaintiff complaint under 28 U.S.C. Sec. 1915(A)(b) upon a faulty characterization of plaintiff's complaint, the District Court's decision must, by its own account, be reversed, and the defendants should not be allowed to bring forth the defense that the District Court have provided for them since the District Court was an unassigned attorney for the defendants.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT UNDER 28 U.S.C. § 1915(A)(B), SINCE PLAINTIFF PAID THE FULL FILING FEE, AND SERVED UPON DEFENDANTS SUMMONS AND COMPLAINT (APP. A, A-21).

A. THE DISTRICT COURT IMPROPERLY MADE FACTUAL DETERMINATIONS IN DISMISSING THE COMPLAINT.

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The court below improperly premised its decision dismissing plaintiff's complaint — upon a factual determination which was contrary to the allegations pleaded in the complaint. It is axiomatic that decision to dismiss are viewed with disfavor. Indeed, decision to dismiss should be made in only the clearest of cases. **Gomez v. USAA Federal Savings Bank**, 171 F. 3d 794 (1999).

Dismissal is appropriate only where after the court has taken all well - pleaded allegations as true (**McEach in v. McGuinnis**, 357 F 3d 197, 200) (2d Cir. 2004) (**Weinstein v. Albigit**, 261 F. 3d 127, 132 (2d Cir. 2001). It appears beyond doubt that the plaintiff can no set of facts in support of his claim. **Speed Auto Sales Inc. V. Motors Corp**., 477 F. Supp 1193 (S.D.N.Y. 1979).

Additionally, a decision to dismiss must be addressed only to the pleadings, and that court may look only within the four corners of the complaint. **Carlucci v. Owens**, 646 F. Supp 1846 (E.D.N.Y. 1986). Finally, a decision to dismiss must not be made if material issues of fact remain unresolved. **Gerasimou v. Gerasimou**, 636 F. Supp 1504 (E.D.N.Y. 1986).

Here, the District Court impermissible disregarded these standards by making and, indeed, in premising its entire decision upon a factual determination.

Not only did the District Court impermissibly make this factual determination, the court's conclusion was — simply put — wrong. At the very least the allegations in the pleadings if taken as true and if all possible inferences are made in plaintiff's favor as is required **Bruce v. Martin**, 691 F. Supp 716 (S.D.N.Y. 1988) state that the defendants named in the complaint committed fraud, conspiracy, and constitutional violations of plaintiff's 5th, 6th and 14th Amendments rights. Yet, the District Court determined that the gravamen of

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plaintiff's complaint is that defendants presented perjurious testimony and false evidence at his trial which led to plaintiff's conviction for murder in the second degree. Plaintiff never revealed what he was convicted for in his complaint, plaintiff only stated that he was indicted for murder in the second degree. Therefore, only by making its own determination of factual issues in the complaint did the District Court reach the conclusion that plaintiff's action was in actuality a malicious prosecution action. Case sounding in malicious prosecution **Heck v. Humphrey**, 512 U.S. 477 (1994) and therefore, be dismissed. In fact, the complaint alleges that the defendants committed fraud (App A1 thru A21) by virtue of its material misrepresentation of existing fact. The allegations in the complaint clearly states facts that support an independent fraud claim. These allegations were, however, improperly ignored — or prematurely scrutinized — by the District Court, as a result, its decision to dismiss must be reversed. (**Crescent City Live Stock Co. V. Butcher's Union Slaughter-Hose**, 120 U.S. 141, 7 S. Ct. 472 (1887).

Plaintiff have pleaded a cause of action for fraud. If the court determines that a claim for fraud and a claim for malicious prosecution are one in the same, throw the United States Constitution out the window, and let lawlessness prevail.

B. THE COMPLAINT STATES A VIABLE CLAIM UNDER NEW YORK LAW.

The common law has long required that a person who made a representation must correct that representation if it becomes false and if he knows people relying on it. Failure of a party to disclose detrimental charges in an earlier representation is concealment and tantamount to a fraudulent representation. The defendants caused plaintiff to rely to his detriment upon

APPENDIX-B

lies, and "thereafter avoid responsibility". It has long been well established under New York Law that a cause of action for fraud exists where the following elements are established:

(1) Misrepresentation, concealment or nondisclosure of a material fact

(2) Intent to deceive on part of the defendant

(3) Justifiable reliance upon the misrepresentation by the plaintiff

(4) Injury to the plaintiff as a result of such reliance.

Indress v. American University of the Caribbean, 546 F. Supp. 1342, 1346 (S.D.N.Y. 1982); Stewart v. Jackson & Nish, 976 F. 2d 86 (2nd Cir. 1992).

Plaintiff alleged each and every one of these elements in his complaint, (App A1 through A21), however, the District Court determined that plaintiff failed to state a claim on which relief may be granted, and dismissed pursuant to 28 U.S.C. § 1915(A)(b). To dismiss for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(II)

Indeed, proper characterization of plaintiff's complaint leads inexorably to one conclusion: that the complaint set forth a viable claim for fraud which should not be dismissed. Reversal of the District Court's determination is therefore mandated.

C. The District Court erred in dismissing plaintiff's claims for fraud because it improperly determined that New York limitation period for fraud carried a three years limitation period. Under New York Law, there are two separately timed and alternative limitations periods in the case of a delayed discovery of fraud **IIT. An Intern. Inv. Trust v. Cornfeld**, 619 F. 2d 909 (2d Cir. 1980), Stull v. Bayard, six years from accrual or two years from discovery, whichever is longer. CPLR, N.Y. 213, Subd. 8, Federal Rule with respect to discovery of fraud is that the statute of limitations commences to run when plaintiff has actual knowledge of the alleged fraud or knowledge of facts which in exercise of reasonable diligence, should have led to

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actual knowledge. Stull v. Bayard, 561 F. 2d 429. In the present complaint, plaintiff discovered fraud on June 9, 2003. Plaintiff's complaint should fall under Federal Rules Civil Provedures Rules, not under in Forma Pauperis.

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CONCLUSION

For all the foregoing reasons, plaintiff, William Montgomery, respectfully submits that the Order of the District Court dismissing his complaint be reversed and vacated and that this case be remanded back to the District Court for further proceeding.

Signed this ___ day of _____2004

I declare under penalty of perjury that the foregoing is true and correct.

"S/_____"

Signature of Plaintiff

_____

Plaintiff's Date of Birth

_____

Social Security Number

APPENDIX-C

THE CITY OF NEW YORK
LAW DEPARTMENT
NEW YORK, NY 10007

October 15, 2004

Hon. Roseann v. MacKechnie
Clerk of the Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 1007

Re: Montgomery v. Macajoux
Docket No. 04-2007-pr

Dear Ms. Mackechnie:

The Corporation Counsel of the City of New York represents defendants-appellees in the referenced appeal. Pursuant to the terms of prisoner appeals scheduling order #1, filed August 18, 2004, this memorandum is submitted in lieu of a brief on behalf of appellees. I would appreciate your distributing the enclosed copies to the judges who are on the panel that will hear the appeal.

Plaintiff-appellant is incarcerated. He brings this pro we action pursuant to 42 USC §§ 1983, 1985 and 1986, alleging that defendants violated his civil rights. Plaintiff appeals from 1) an order of the United States District Court for the Eastern District of New York (Korman, Ch. J.), entered March 30, 2004, that, pursuant to 28 USC § 1915A(b), dismissed the complaint "for

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failure to state a claim on which relief may be granted;" and 2) a judgment of the same Court, entered March 30, 2004, that dismissed the complaint. As cogently summarized by the District Court, "[t]he gravamen of plaintiff's complaint is that defendants presented perjurious testimony and false evidence at his trial which led to his conviction for murder in the second degree."

On plaintiff's appeal, defendants rely upon, and respectfully refer this Court to, the factually and legally correct, well-reasoned memorandum of the District Court. I have reviewed plaintiff's brief to this Court, and I have concluded that the arguments therein do not support plaintiff's contention that the District Court "erred as a matter of law." Rather, the Court's interpretation of the relevant law and its application of that law to the facts were in all respects correct.[3] In this regard, it is noted that the District Court determined "that any appeal would not be taken in good faith."

Upon the District Court's memorandum and the record on appeal to this Court, the order and the judgment appealed from dismissing the complaint should be affirmed in all respects.

Very truly yours,

"S/_____"
Ronald E. Sternberg (RS2242)

cc: Mr. William Montgomery
Plaintiff-Appellant, pro se

---

[3] Plaintiff contends, inter alia, that "the District Court erred in dismissing [his] complaint pursuant to 28 USC Sec. 1915A(b) because [he] paid the full filing fee up front" (App's Br., at 20). Plaintiff appears to be confusing section 1915 ("Proceedings in forma pauperis") with section 1915A ("Screening"), properly relied upon and applied by the District court.

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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

CAITLIN J. HALLIGAN
Solicitor General

Eliot Spitzer
Attorney General

(212) 416-8023

May 10, 2004

Yolanda Siders, Deputy Clerk
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

Re: Montgomery v. Macajoux, No. 04-2007-pr

Dear Ms. Siders:

I am writing in response to the docketing letter which your Office sent to this Office. Because there is no State party in this appeal, we are unable to appear as counsel in the appeal. Therefore, I am returning the docketing letter and its enclosures to you.

The defendant-appellees in this case are an employee of the Office of the Chief Medical Examiner of New York City; Kings County Hospital; and certain physicians who are apparently on the staff of that Hospital. Therefore, I suggest that you contact the Office of the Corporation Counsel of the City of New York, and the Hospital, to ascertain whether they wish to appear in this appeal. Also, Please remove Attorney General

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Spitzer from the docket sheet as counsel for the defendants-appellees. Thank you.

Sincerely,

David Lawrence III,
Assistant Solicitor General

Enclosures

cc (w/o encl.): William Montgomery
93-A-3457
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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Mr. William Montgomery
Din No. 93-A-3457
Attica Correctional Facility
Box 149
Attica, New York 14011-0149

To: United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Rosenann B. Mackechnie / Clerk

Re: William Montgomery v. Macajoux, No. 04-2007-PR

Dear Ms. Siders:

I'm writing in response to the "Set" date for oral arguments which was scheduled for March 17, 2005. Could you please explain or / and confirm why Attica Correctional Facility failed to produced the Plaintiff, (William Montgomery) to the requested site for oral arguments? Was a Court Order to produce the Plaintiff at the requested site for the purposes of giving an oral argument pertaining to the matter above issued to Attica Correctional Facility?

Thank you for your time and patience concerning this important legal matter.

Respectfully,

"S/_____"
Montgomery 93-A-3457

APPENDIX-D
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM MONTGOMERY
Plaintiff-Appellant

JURY TRIAL DEMAND

-against-

OFFICE OF THE CHIEF MEDICAL
EXAMINER N.Y. CITY: MARIE MACAJOUX,
KINGS COUNTY HOSPITAL: Dr. PEPI DAKOU
Dr. TUDOR, Dr. JOHNSON,
Dr. THOMAS SCALEA, M.D., Dr. SHIH,
Dr. ADLER, Dr. KLIEN,
Dr. ELLOWITZ, Dr. KOTZEN,
Dr. KELLY, Dr. Dr. CHIN, Dr. SHELBY,
Dr. SAMUEL, Dr. KRAUS,
Dr. VERTIL, Dr. McRAE
Dr. MCRAE, INVESTIGATOR HAHN.
Defendants.

I.COMPLAINT

1. The Plaintiff (William Montgomery) pro-se, for his complaint state as follows:

On June 9, 2003, William Montgomery an inmate at Attica Correctional Facility discovered after extensive research through well established medical institutions that the Chief

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Medical Examiner Marie Macajoux, Dr. Pepi Dakou, Dr. Thomas Scalea, Dr. Johnson, Dr. Ellowitz, Dr. Klien, Dr. Kelly, Dr. Adler, Dr. Kotzen, Dr. Chin, Dr. Shelby, Dr. Samuel, Dr. Kraus, Dr. Vertil, Dr. McRae, Medico-Legal Harold Hahn committed the illegal actions: consisting of fraud, conspiracy, and constitutional violations of Plaintiff's 5th, 6th and 14th Amendment rights. Section 1983, 1985(2)(3) and 1986.

II PLAINTIFF

2. Plaintiff (William Montgomery) is confined at Attica Correctional Facility, located Box 149, Attica, New York 14011-0149, in the City of Attica, in the state of New York from August 10, 1993. Plaintiff is currently confined at Attica Correctional Facility.

3. Plaintiff (William Montgomery) is, and was at all times mentioned herein, an adult citizen of the United States and resident of the State of New York.

III DEFENDANT

Medical Examiner Marie Macajoux is, and was at all times relevant hereto, a medical examiner engaged in the practice of performing autopsy, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with her principle place of business as office Chief Medical Examiner at 520 First Avenue, New York, New York 10016.

5. Dr. Dakou is, and was at all times relevant hereto, a medical doctor engaged in the practice of providing medical attention to the citizen of New York and upon information and belief, organized as well as existing under and pursuant to the

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laws of the state of New York, and the United States Constitution, with "his or her" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

6. Dr. Tudor is, and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

7. Dr. Johnson, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

8. Dr. Scalea, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

9. Dr. Adler, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at

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Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

10. Dr. Klien, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

11. Dr. Kotzen, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

12. Dr. Samuel, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

13. Dr. Shelby, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

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14. Dr. Chin, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

15. Dr. Kelly, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

16. Dr. Straus, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

17. Dr. Vertil, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

18. Dr. McRae, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical

APPENDIX-D

attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

19. Dr. Ellowitz, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

20. Dr. Harlod Hahn, is and was at all times relevant hereto, a medical Doctor engaged in the practice of providing medical attention to the citizens of New York, and upon information and belief, organized as well as existing under and pursuant to the laws of the State of New York, and the United States Constitution, with "his or hers" principle place of business at Kings County Hospital, 451 Clarkson Avenue, Brooklyn, New York 11203.

21. This action arises under and is brought pursuant to 42 U.S.C. §§ 1983, 1985(2)(3), 42 U.S.C. 1986, to remedy the deprivation, under color of State law, of rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. They are all sued in their individual and official capacities.

IV. JURISDICTION

22. This is an action for declaratory, injunction, and monetary relief. The court has jurisdiction over this matter, pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1985(2)(3), 42 U.S.C. § 1983, 42 U.S.C. § 1986, in Constitutional violations

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of Plaintiff's 5th Amendment, 6th Amendment, and 14th Amendment rights. This matter in controversial excess the sum of $10,000.00, and is between citizens of the same state. New York State.

V VENUE

23. Venue is properly laid in this district and that the Respondent's principle place of business is located in this district, which is furthermore fully detailed herein. All claims asserted by plaintiff arose in this district.

VI PREVIOUS LAWSUITS BY PLAINTIFF

24. Plaintiff has filed no other lawsuits dealing with the same facts involved in this action or otherwise relating to his imprisonment.

VII STATEMENT OF CLAIMS

25. On August 22, 1991, plaintiff William Montgomery was arrested and charged with assault on Thomas Drew. However thirty-eight (38) days later plaintiff was recharged and indicted for murder in the second degree. (App A-6, A-7)
26. Statements and information provided by medical examiner Marie Macajoux during the period of Thomas Drew's hospitalization at Kings County Hospital, and relating to the cause of his death was the basis for the fraudulent indictment of murder in the second degree brought forth by the district attorney against the plaintiff. (App. A-7, A-8, A-9, A-10).

27. Medical Examiner Macajoux performed her autopsy upon Thomas Drew on October 1, 1991. Her autopsy report indicates "pre-existing" medical condition at the cardiovascular

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system. Moreover, Medical Examiner Marie Macajoux knew that the named "doctors" in this complaint miss diagnose pericarditis for pneumonia even though numerous x-rays revealed Thomas Drew's lungs were clear during his hospitalization.

28. On or about October 7, 1991, Medical Examiner Marie Macajoux stated to the Grand Jury in the County of Kings, and the district attorney that: "while in the hospital bed Thomas Drew became infected with bronco-pneumonia, and pericarditis which caused his death". Medical Examiner Marie Macajoux on behalf of the medical examiner's office knowingly made false or misleading statements regarding the existence of a "pre-existing" medical condition n in relation to the health of Thomas drew during his hospitalization at Kings County Hospital. Medical Examiner Macajoux knew and failed to disclose a material fact to the Grand Jury and District Attorney in that Thomas Drew had pericarditis, a medical condition pre-existing before he was admitted into Kings County Hospital". Furthermore, when Medical Examiner Macajoux performed her autopsy on Thomas Drew on October 1, 1991, her autopsy report indicated the "pre-existing" medical condition at the cardiovascular system.

29. Medical Examiner Macajoux was aware of the fact that the district attorney, Grand Jury, and plaintiff would accept the medical examiner's statement as true, and that the Grand Jury, Plaintiff and district attorney relied upon the fraudulent misrepresentation made by Medical Examiner Macajoux, regarding the medical condition of Thomas Drew while hospitalized.

30. Medical Examiner Marie Macajoux statement "that while Thomas Drew was hospitalized he became infected with bronco-pneumonia and pericarditis", this statement is inconsistent with medical examiner's autopsy report.

31. Plaintiff, the persecuting district attorney, and the

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Grand Jury relied upon medical examiner fraudulent misrepresentation of a material existing fact, and improper concealment of material fact as aforesaid by inter alia, accepting the Medical Examiner Macajoux's statement as true, which consequently lead to plaintiff being indicted with murder in the 2nd degree, by the Grand Jury, which violated plaintiff's due process rights.

32. Medical Examiner Marie Macajoux's fraudulent misrepresentation of pertinent material facts violate the plaintiff's core constitutional rights to due process and equal protection under the law. Medical Examiner Macajoux acted in an indifferent manner and in total disregard of the plaintiff's 14th Amendment rights to due process and equal protection under the law, and 6th Amendment right to compulsory right. Medical Examiner Macajoux maliciously and intentionally misrepresented vital facts, causing plaintiff severe violation of his rights to a fair trial by the constitution of the United States. Medical Examiner Macajoux denied plaintiff the fiduciary duty owed to him by her.

33. Medical Examiner Macajoux's misrepresentation and concealment about Thomas Drew's medical condition prior to, and during his hospitalization, and autopsy report affected not only the Grand Jury proceeding, district attorney, and plaintiff, but affected the public generally, and involves a gross departure from accepted and responsible behavior. Omission in the face of duty to disclosed, violated plaintiff's federal constitution and due process rights.

34. The performance or results of any examination, or test, and moreover, refusal or failure to disclose and identify the nature of the very pertinent physical evidence; when there is reason to believe that there exist the likelihood of substantial harm to an individual or to the public interest: would violate the plaintiff's constitutional rights to due process of law.

35. A Grand Jury inquest is a body with investigative

powers and inquisition. The scope of whose inquires are not to be limited or interfered with by misleading information from any witness, especially one with a fiduciary duty (such as a Medical Examiner).

36. Medical Examiner Marie Macajoux do not exercise powers of peace officers, or exercise any other law enforcement powers and have no authority to bring charges against anyone, rather, she is a doctor qualified as pathology and corner. Therefore, when Medical Examiner Macajoux misled the district attorney, and Grand Jury, she violated the integrity of the Grand Jury proceedings itself. Also violated plaintiff's 5th Amendment right to due process, 6th Amendment right to compulsory rights, and 14th Amendment rights to due process, and equal protection of the law.

37. The district attorney, and plaintiff relied upon Medical Marie Macajoux's false statement to: loss of liberty, loss of income, loss of family, and mental anguish.

38. On February 16, 1993, Medical Examiner Marie Macajoux gave false, and misleading statement to plaintiff, trier-of-facts and district attorney at 360 Adam Street, Supreme Court, County of Kings. Medical Examiner Marie Macajoux stated "while in the hospital bed Thomas Drew became infected with bronco-pneumonia and pericarditis which caused his death". This statement is inconsistent with Medical Examiner Macajoux's autopsy report, and all medical documentation made during Thomas Drew's hospitalization which she claimed to have read to

39. Medical Examiner Marie Macajoux, on Behalf of the medical examiner's office, knowingly made false statements regarding the existence of a "pre-existing medical condition in relation to the health of Thomas Drew.

40. On February 16, 1993, Medical Examiner Marie Macajoux failed to disclose a material existing fact, "that Thomas Drew had" pericarditis, before he was admitted into

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Kings County Hospital. Furthermore, when Medical Examiner Macajoux performed an autopsy on Thomas Drew on October 1, 1991, her autopsy report revealed the pre-existing medical condition at the cardiovascular system. She also failed to disclose said information to the district attorney. Medical Examiner Macajoux was aware of the facts that the district attorney and plaintiff accepted her statements as true, and relied upon the fraudulent misrepresentation made by Medical Examiner Macajoux regarding the medical condition of Thomas Drew while being hospitalized.

41. Medical Examiner Macajoux misrepresentation of material existing fact violated plaintiff's constitutional rights and federally protected rights, as well as plaintiff's 5th Amendment rights to due process of law, 6th Amendment right to compulsory right, and 14th Amendment rights to due process and equal protection of the law. Medical Examiner Macajoux willfully and intentionally denied plaintiff the fiduciary duty owed to him.

42. Dr. Pepi Dakou, a neuro-surgeon, fraudulently and knowingly misrepresented material existing fact in a written statement that was placed in evidence at plaintiff's trial at 360 Adam Street, Supreme Court, in the County of Kings on February 16, 1993, which states: "while being attended to at Kings County hospital Thomas Drew developed "numerous pneumonia." which resulted in renal failure (kidney).

43. Dr. Pepi Dakou was at the time the leading physician and had numerous tests ordered on "secretions" that were suctioned from Thomas Drew on the date he was admitted to Kings County Hospital. Furthermore, medical documentation will show that from August 23, 1991, the day Thomas Drew was admitted to Kings County Hospital through October 30, 1991, the date he expired, numerous tests were ordered on the "secretions" that was being suctioned from Thomas Drew. Based upon Dr. Pepi Dakou's position as the leading physician,

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medical documentation, tests-results, medical examiner's autopsy report, he knew that Thomas Drew did not lay in the hospital bed developed "numerous pneumonia" as he suggested in his written statement which was placed in evidence at plaintiff's trial on February 16, 1993.

44. Misrepresentation and intentional misrepresentation of a material existing fact benefitted Dr. Dakous, because Dr. Dakou and Kings County Hospital would be facing a lawsuit for malpractice from the family members of Thomas Drew. For argument sake, if Thomas Drew had "numerous pneumonia" as Dr. Dakou has suggested in his written statement, then it would be logical that Thomas Drew's lungs especially the bronchioles would became inflamed as they clogged with pus and mucus. Certainly they would not be clear as the medical documentation describes.

45. Based upon the contradictions between all consultation notes, medical documentation, medical examiner Marie Macajoux's autopsy report, and Dr Pepi Dakou written statement they conspired to violate plaintiff's constitutional rights, and saving Kings County Hospital, and the "Doctors" named in this complaint from a potential malpractice lawsuit from family members of Thomas Drew.

46. Dr. Dakou fraudulent misrepresentation of material existing facts violated plaintiff's constitutional rights and federally protected rights, as well as plaintiff's 5th Amendment rights to due process of law, 6th Amendment right to compulsory rights, and 14th Amendment rights to due process and equal protection of the law. Dr. Dakou willfully and intentionally denied plaintiff the fiduciary duty owed to him.

47. All medical documentation and autopsy report will show that Thomas Drew had an infection only at the cardiovascular system. Furthermore, medical documentation will show and prove that Thomas Drew's lungs were clear during his hospitalization at Kings County Hospital. Moreover, on

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September 16, 1991, and September 17, 1991, consultations was held to evaluate Thomas Drew's medical conditions. These consultations notes described in details that Thomas Drew's lungs were clear, and that they (Doctors) underestimated Thomas Drew's bradycardia (EKGS) abnormalities. Dr. Dakou had access to these consultations notes and all medical documentation. When Thomas Drew was admitted to Kings County Hospital on August 23, 1991, medical documentation showed that Thomas Drew had an infection. These medical documents was also available to Dr. Dakou. If the patient's lungs were clear as the "many" medical documents express, one can only conclude that the "numerous pneumonia" does not exist.

48. Plaintiff and district attorney relied upon Dr. Dakou's misrepresentation in a written statement to their detriment, causing plaintiff severe damages as stated but not limited to: loss of liberty, loss of family, loss of income, and mental anguish.

49. On March 30, 1993, Medical Examiner Marie Macajoux again stated to the plaintiff, second trier of facts, and district attorney that "while in the hospital bed Thomas Drew became infected with bronco-pneumonia and pericarditis which caused his death". This was done in furtherance of conspiracy, and the product of a corrupt conspiracy involving the intentionally and willfully obstruction of justice and conspiring with others to obstruct justice, and violate plaintiff's equal protection rights, and due process rights. Medical Examiner Macajoux denied plaintiff the fiduciary duty owed to him by her.

50. Upon information, and belief Medical Examiner Marie Macajoux made said misrepresentation to plaintiff and the district attorney despite the fact that she knew such statements to be false. The district attorney, and plaintiff relied upon these false statements to their detriment, causing severe damages to

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plaintiff. Medical Examiner Marie Macajoux showed class based bias toward "criminals". Based upon medical examiner Macajoux oral statements she believe "criminals" are not entitle to constitutional protection.

51. On March 30, 1993, Dr. Dakou's written statement was placed in evidence again in the County of Kings, Supreme Court, 360 Adam Street. (App A-13).

52. Upon information and belief Medical Examiner Marie Macajoux, and Dr. Pepi Dakou made such misrepresentation of a material existing fact to plaintiff, and the district attorney despite the fact that they knew statements to be false. The defendants named in this complaint knew or reasonably should have known that Thomas Drew did not lay in the hospital bed and developed bronco-pneumonia and pericarditis. Medical documents, and medical examiner Marie Macajoux autopsy report will show that Thomas Drew had pericarditis when he was admitted to Kings County Hospital on August 23, 1993. The district attorney, and plaintiff relied upon these false statements to their detriments, plaintiff was forced to endure severe damages, as stated but no limited to "loss of liberty, loss of income, loss of family, and mental anguish."

53. Harold Hahn Medico-Legal" investigated the cause of death of Thomas Drew while being hospitalized at Kings County Hospital. As a Medico-Legal: Investigator Harold Hahn specialized in "forensic medicine" the science which teaches the application of every branch of medical knowledge to the purposes of the law to enable a court of law to arrive at a proper conclusion on a contested question affecting life, or property. After investigator Harold Hahn interviewed the "Doctors" named in this complaint, Medical Examiner Marie Macajoux, and review the numerous medical documentation made during Thomas Drew's hospitalization, the medical examiner's autopsy report, and consultations notes dated September 16, 1991, and September 17, 1991, he knew or reasonably should have known

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that Thomas Drew did not lay in Kings County Hospital bed and contracted pericarditis and numerous pneumonia. (App A-13, A-14).

54. Investigator Harold Hahn by not coming forth with the truth about his findings after his investigation into the cause of death of Thomas Drew he knowingly, willfully and intentionally conspired with Medical Examiner Marie Macajoux, and Dr. Pepi Dakou to violate Plaintiff's 5th Amendment right to due process of law, 6th Amendment right to compulsory right, and 14th Amendment right to due process and equal protection of the law. Investigator Harold Hahn willfully, and intentionally denied plaintiff the fiduciary duty owed to him.

55. Based upon all medical documentation, medical examiner's autopsy report, and consultation notes investigator Hahn conspired to violate plaintiff's constitutional rights. Investigator Hahn knew or reasonably should have known that the actions he took within his official responsibility would violate plaintiff's federally protected rights.

56. Dr. Thomas Scalea, the admitting physician, admitted Thomas Drew into Kings County Hospital on August 23, 1991, for a single gun shot wound. According to medical documents, dated August 23, 1991, Dr. Scalea ordered that Thomas Drew be suctioned for "secretions and that the secretion be sent to a laboratory for analysis. Chest X-rays revealed pneumonia, however, lung fields showed both lungs were clear on admission. This information was also given to Dr. Scalea. (App A-14, A-15).

57. According to medical documents, numerous tests were ordered by Defendants': Dr. Dakou, Dr. Scalea, Dr. Tudor, Dr. Johnson, Dr. Klien, Dr. Adler, and Dr. Kotzen on the different varieties of "secretions" that were collected on August 23, 1991, through September 30, 1991. The results of those tests were reported to each of the above named defendants which indicated that Thomas Drew had a pre-existing infection

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independent of the gun shot wound. Furthermore, while being suctioned, Thomas Drew displayed "bradycardia", his EKGS should abnormalities which indicated that something else constricting his normal heart function. This also was reported to each of the above named defendants, and documents in Thomas Drew's medical charts. However, medical charts indicated that no procedures were administered for his EKGS abnormalities.

58. On September 16, 1991, and September 17, 1991, consultations were held to evaluate the status of Thomas Drew's medical condition which included defendants: Dr. Chin, Dr. Shelby, Dr. Samuel, Dr. Kelly, Dr. Vertil, Dr. Kraus, and Dr. McRae. These consultations noted describe in detail that Thomas Drew's lungs were clear during Drew's hospitalization, and they "Doctors" underestimated Thomas Drew's bradycardia EKG' abnormalities. According to medical documentation the defendants named in this complaint knew nothing about Thomas Drew's pericarditis infection because they misdiagnose it for pneumonia because the bacteria it gave off were pneumonia symptoms. (App A-15, A-16).

59 The aforementioned "Doctors" knew or reasonably should have known that the actions they took within their sphere of official responsibility by not coming forth with the truth about Thomas Drew's pre-existing medical condition independent of the gun shot wound would violate plaintiff's 5th Amendment right to due process of law, 6th Amendment right to compulsory rights, and 14th Amendment right to due process and equal protection of the law. These "Doctors" named in this complaint willing and intentionally denied Plaintiff the fiduciary duty owed to him by them.

60. Based upon medical documentation, Medical Examiner Marie Macajoux's oral statement during Grand Jury Proceedings, Medical Examiner's oral statements during trial on February 16, 1993, medical examiner's statement during Plaintiff's second trial on March 30, 1993, medical tests, the

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results of those test, consultation notes, medical examiner Marie Macajoux's autopsy report, Dr. Dakou written statements, Investigator Harold Hahn investigation. They conspired to violate Plaintiff's constitutional rights. The remaining defendants by failing to give imputed notice to Plaintiff or Plaintiff's attorney of record violated Plaintiff's constitutional rights, because they had access to all medical documentation, medical test, the results of those test, and consultation notes. They had imputed knowledge because the fact in question were open for their discovery, and neglect prevent the wrong. Based upon the aforementioned, these "Doctors" showed class based bias towards criminals, and negligent misrepresentation.

COUNT ONE: FRAUD IN VIOLATION OF 42 U.S.C. § 1983

61. Paragraph 1 through 60 are reported and re-alleged as though fully set forth herein.

62. By their actions defendants exercised deliberate indifference to Plaintiff's constitutional rights guaranteed by Fifth, Six and Fourteenth Amendment of the United States Constitution by committing the offense of fraud.

COUNT TWO: FRAUD IN VIOLATION OF 42 U.S.C. § 1983

63. Paragraphs 1 through 60 are repeated and re-alleged as though fully set forth herein.

64. By their actions defendants exercised deliberate indifference to Plaintiff's constitutional rights guaranteed by Fifth, Six and Fourteenth Amendment of the United States Constitution by committing the offense of fraud.

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COUNTY THREE; FRAUD IN VIOLATION OF 42 U.S.C. § 1983

65. Paragraphs 1 through 60 are repeated and re-alleged as though fully set forth herein.

66. By their actions defendants exercised deliberate indifference to Plaintiff's constitutional rights guaranteed by Fifth, Six and Fourteenth Amendment of the United States Constitution by committing the offense of fraud.

COUNT FOUR: CONSPIRACY TO DEPRIVE ACCESS TO JUSTICE AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF 42 USC § 1985(2)

67. Paragraphs 1 through 60 are repeated and re-alleged as though fully set forth herein.

68. By their actions defendants exercised deliberate indifference to Plaintiff's constitutional rights guaranteed by Fifth, Six and Fourteenth Amendment of the United States Constitution by committing the offense of fraud.

COUNT FIVE: NEGLECT TO PREVENT IN VIOLATION OF 42 U.S.C. § 1986

69. Paragraph 1 through 60 are repeated and re-alleged as though fully set forth herein.

70. Based upon the positions of these defendants as "Doctors", medical documentation, test results, autopsy report,

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and consultation notes, these defendants had imputed knowledge to prevent the conspiracy to obstruct justice, influence the grand jury, the verdict and o deny plaintiff equal protection of the law, nut neglect to prevent the wrongs.

71. By virtue of the foregoing, the defendants have violated the United States Constitution, New York State Constitution and statutory laws, and without limitation on the foregoing the defendants have specifically violated the United States Constitution, the law of the State of New York, and committed the offense of fraud against plaintiff.

COUNT SIX: NEGLIGENT MISREPRESENTATION

72. Paragraph 1 through 60 are repeated and re-alleged as though fully set forth herein.

73. Based upon the positions of these defendants as "Doctors, they owes the plaintiff fiduciary duty.

74. Defendants' conduct as alleged herein justifies and award of punitive damages.

CLAIM FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court issue judgment granting:

1. A declaration that the acts of defendants described herein are unlawful

2. A declaration that defendants' policies, practices and procedures were unlawful on their face as applied to plaintiff.

3. A permanent injunction ordering defendants not to enforce any an all policies, practices or procedures which are determined by this Court to be unlawful.

4. Compensatory damages in the amount of ten million dollars ($10,000000.00) of each defendant, for each cause of

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action.

5. Punitive damages in the amount of five million dollars ($5,000000.00) of each defendant, for each cause of action:

6. The costs of this action:

7. The reasonable fees and expenses of plaintiff's attorney, and

8. Such other and additional relief as the court may deems just and proper.

Signed this ___ day of February, 2004
I declare under penalty of perjury that the foregoing
is true and correct.

"S/_____".

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CRESCENT CITY LIVE-STOCK LANDING & SLAUGHTER-HOUSE CO. V. BUTCHERS' UNION SLAUGHTER- HOUSE & LIVE-STOCK LANDING CO. 120 U.S. 141, (JANUARY 24, 1887)

MATTHEWS, J.

This is a writ of error bringing into review a judgment of the supreme court of the state of Louisiana, reported in 37 La. Ann. 874. The federal question arising upon the record presented for our consideration is whether the supreme court of Louisiana, in it's determination of the case, gave due effect to a certain decree of the circuit court of the United States for the Eastern district of Louisiana, in a previous litigation between the same parties. That question is presented upon the following case:

The plaintiff in error is a corporation created by the laws of Louisiana, which, by an act of legislation of that state, passed March 8 1869, was invested with the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter- house business within the city of New Orleans, and the parishes of Orleans, Jefferson, and St. Bernard. The validity of this monopoly was sustained by the decision of this court in the **473*Slaughter-house Cases*, 16 Wall. 36, on the ground that this grant of exclusive right or privilege was a police regulation for the health and comfort of the people within the power of the state legislature, and not in violation of any provision of the constitution of the United States. The company continued thenceforward to use and enjoy it's exclusive privileges until the adoption by the people of Louisiana of a new state constitution in the year 1879. That constitution contained the following articles: Art. 248. The

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authorities of all incorporated municipalities of the state, shall alone have the power of regulating the slaughtering of cattle and other live-stock within their respective limits: provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation : provided, the ordinances designating places for slaught obtain the concurrent approval of the board of health or other sanitary organization.

Art. 258. The monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies are hereby abolished.'

The city of New Orleans by ordinances adopted in 1881, proceeded to declare, under article 248 of the constitution, within what limits in the parish of Orleans animals, intended for food, might be slaughtered, in which the board of health of the state of Louisiana concurred. In March 1980, the Butchers' Union Slaughter-house & Live-stock Landing Company, the defendant in error, became incorporated under the general law of Louisiana; and was authorized by it's charter " to erect at any point or place in the parish of Orleans, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, for the purpose of carrying on the live-stock landing and slaughter-house business, and for the purpose of sheltering and protecting all such cattle or other animal which may be sent to said company destined for slaughter, and the said company shall, as soon as practicable, build and complete a slaughter-house; also a sufficient number of sheds and stables and other buildings as may be deemed necessary for carrying on said slaughtering business "

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This company having begun to acquire the necessary plant for conducting the live-stock and slaughtering business, in pursuance *144 of its charter, the plaintiff in error, on the twenty-third of November 1881, filed it's bill in the circuit court of the United States for the Eastern district of Louisiana against the defendant in error, setting up it's exclusive right and privilege, as claimed by it under it's original charter and grant, alleging that the defendant was about to violate the same, and praying for an injunction to restrain that company from carrying out it's purpose. On the twenty-ninth of December 1881, after notice and hearing, the judges of that court granted the injunction as prayed for, pendente lite. On final hearing, on the eighth of May, 1882, this injunction was made perpetual. (FN1) On may 5, 1884, this decree of the circuit court was reversed by this court by a decision reported in 111 U.S. 746, S.C. 4 Sup. Ct. Rep. 652, on the ground that the exclusive right originally granted to the plaintiff in error was valid only as an exercise of the police power of the state, and was of that character, having reference to the public health, that it could not be made the subject of contract, protected against subsequent legislation by the constitution of the United States

In granting the preliminary injunction referred to, the plaintiff in error was required to and gave an injunction bond in the sum of 8,000, with Bertrand Saloy as surety, reciting the allowance of the injunction pendente lite, and conditioned to pay the defendant in said injunction all such damages ***474 as it might suffer or had suffered in consequence thereof. The present action was begun in the civil district court for the parish of Orleans on May 28, 1884, by the defendant in error against the plaintiff in error and Bertrand Saloy, by a petition in which a recovery is sought upon the bond against the defendant in solido for the sum of 8,000, with 5 per cent interest from judicial demand, for a breach of it's condition, and against the company

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alone for the further sum of 70,000 damages, with 5 per cent interest from the date of the verdict, on the alleged ground of malicious prosecution by the complainant therein of the said bill in equity for an injunction. This cause came for trial by a jury, when there was a verdict against both defendants for 6,588.80, with interest, and against the Crescent City Live-stock Landing & Slaughter-house Company alone, upon the plea of malicious prosecution, for the sum of 12,500 damages, and the further sum of 2,5000 attorneys' fees. Upon the trial the defendant relied upon the decree of the circuit court of the United States , granting and perpetuating the injunction, as conclusive proof of probable cause for the institution and prosecution of the suit complained of. The rulings of the civil district court upon this defense are set out in several bills of exception. In one of them it appears that the judge left it to the jury to determine whether the decree of the circuit court constituted probable cause or not, adding that in his opinion it was both remarkable and extraordinary, and, as explanatory of that, the bill of exceptions signed by him contains the following statement:

" I described the action of the federal court as " remarkable and extraordinary", because it set at naught the decisions of the state courts of Louisiana, of the supreme court of Louisiana, set at defiance the positive mandate of the state constitution, and because it was held by the unanimous supreme court of the United States to have involved a usurpation of jurisdiction; such an action was truly " remarkable and extraordinary" though not without deplorable precedent."

It also appears that the defendants requested the judge to charge the jury as follows:

" A plaintiff whose asserted right was conferred by an act of legislation, and has been in force for a number of years, has a right to test the legality of a subsequent repeal of said right, when the validity of such repeal or modification has been finally

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settled, and the plaintiff is advised by competent counsel that the repeal is invalid. In such a case the plaintiff has probable cause for asserting his rights, and instituting an action for such purpose. If, in the action instituted, the lower court being the circuit court of the United States, presided over by two judges, render a judgment in favor of the plaintiff, the existence of probable cause for instituting such suit is demonstrated by the finding of the judges of the circuit court, although their judgment was reversed on appeal"

This charge the judge refused to give , on the ground that it was unsound in law. Judgment was rendered on the verdict February 24, 1885, and the cause was removed by a suspensive appeal to the supreme court of Louisiana for the final decision of that court, by which, on December 14, 1885, it was affirmed.

It is contended by counsel for the defendant in error that, in examining the record in this case, this court will only consider the opinion and judgment of the supreme court of Louisiana in order to ascertain if the authority relied upon by the plaintiff in error was wrongfully disregarded by the tribunal and that without reference to the rulings of the inferior court, the opinion of the supreme court being made a part of the record by law for that purpose. Such appears to be the law of Louisiana, as recognized by the decisions of this court. Code Pr. La. Art.905; *Parks v. Turner* 12 How.43; *Hennen, Dig.* 92, No. 3; *Cousin v. Blanc's Ex'rs*, 19 How. 202; *Grand Gulf r & B. Co. V. Marshall*, 12 How. 165; *Murdock v. City of Memphis*, 20 Wall.590; *Crossley v. City of New Orleans*, [illegible] S. 105; S.C. 2 Sup. CT. Rep.300; *Caperton v. Bowyer*, 14 [illegible]all.216

**475 It must therefore be conceded that the sole question to be determined is, did the supreme court of Louisiana, in deciding

against the plaintiffs in error, give the proper effect to the decree of the circuit court of the United States, subsequently reversed by this court ?

It is argued by counsel for the defendant in error that this does not embrace any federal question; that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana, by the courts of that state, is to be determined by the law of Louisiana, or by some principle of general law, as to which the decision of the state court is final and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process, although, as was said by this court in Dupasseur v. Rochereau, 21 Wall. 130, 135: *147 'No higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case, under such circumstances, than is due to the judgment of the state courts in a like case, and under similar circumstances.' Embry v. Palmer, 107 U.S. 3; S.C. 2 Sup. Ct. Rep. 25. It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the supreme court of Louisiana to the decrees of the circuit court of the United States here drawn in question.

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The decree of the circuit court was relied upon in the state court as a complete defense to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The supreme court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever. It is conceded that, according to the law of Louisiana, the action for a malicious prosecution is founded on the same principles, and subject to the same defenses, as have been established by the common law prevailing in the other states.

In the case of Hugh v. New Orleans & C.R.Co., 6 La. Ann. 495, it was said that 'the dispositions of article 2294 are found in the Roman and Spanish laws. So far from being new legislation, that article embodies a general principle as old as the science of jurisprudence itself, and it must still be understood with the limitations affixed to it by the jurisprudence of Rome and Spain. Domat Lois Civiles, tit. 'Dommages Causes par des Fautes,' . 180, par. 1.' In the same case the court said on a rehearing: 'The article 2294 of our Code provides that every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it the provisions of this article, however general and comprehensive its terms may be, may be found more than once recited in terms equally general and comprehensive *148 in the laws of the fifteenth title of the seventh Partidas. The article was inserted in the Code of 1809, at a time when the Spanish Laws were in force. It was put, and retained to this time, in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a code, --a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a code or not.'

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In the case of Senecal v. Smith, 9 Rob. (La.) 418, it had been previously decided that, 'in cases of this kind, it is well settled that malice and the want of probable cause in the original action are essential ingredients. Malice may **476 be expressly proved, or it may be inferred from the total want of a probable cause of action; but malice alone, however great, if there be a probable cause upon which the suit or prosecution is based, is insufficient to maintain an action in damages for a malicious prosecution.'

In the case of Gould v. Gardner, 8 La. Ann. 11, it was determined that the defendants in the case were not without probable cause for the arrest of the plaintiff, which was the ground of the action, because they acted by the advice of eminent and learned counsel, though his opinion was held to be erroneous. The court refer to the case of Stone v. Swift, 4 Pick. 389, in Massachusetts, and that of Foshay v. Ferguson, 2 Denio, 619, in New York, as sufficient authority in support of their opinion, and add as follows: 'Our code and statutes have not provided any rules to guide us on the trial of such actions, and we are governed in the absence of positive legislation by the rules laid down in the authorities quoted, because we consider them just and reasonable in themselves.' In the opinion in the present case, the supreme court of Louisiana say that to sustain the charge of malicious prosecution It is necessary to show '(1) that the suit had terminated unfavorably to the prosecutor; (2) that in bringing it the prosecutor had acted without probable cause; (3) that he was actuated by legal malice, i.e., by improper or sinister motives. The above three elements must concur.'

*149 And, when there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court. Stewart v. Sonneborn, 98 U.S. 187, 194. Want of probable cause, and the existence of malice, either express or implied, must both concur to entitle the plaintiff in an action for

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a malicious prosecution to recover. So that, if probable cause is shown, the defense is perfect, notwithstanding the defendant in instituting and carrying on the action may have been actuated solely by a motive and intent of malice. If he had probable cause to institute his action, the motives by which he was actuated, and the purposes he had in view, are not material.

How much weight, as proof of probable cause, shall be attributed to the judgment of the court in the original action, when subsequently reversed for error, may admit of some question. It does not appear t have ben judicially determined in Louisiana. In the case of *Griffis v. Sellars*, 4 Dev. & B. 177, RUFFIN, C.J., said 'that probable cause is judicially ascertained by the verdict of the jury, and judgment of the court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court.' In *Whitney v. Peckham*, 15 Mass. 243, such a judgment was held to be conclusive in favor of the existence of probable case. To the same effect is *Herman v. Brookerhoff*, 8 Watts, 240, in an opinion of Chief Justice GIBSON. The decision in the case of Whitney v. Peckham, ubi supra, however, was questioned by the supreme court of New York in the case of Burt v. Place, 4 Wend. 591, 598, where MARCY, J., delivering the opinion of the court, said that the Massachusetts decision rested entirely upon Reynolds v. Kennedy, 1 Wils. 232, which had been qualified by the decision of ERYE, baron of the exchequer, in Sutton v. Johnstone, 1 Term R. 505, and by what was said by Lord Mansfield and Lord LOUGH BOROUGH in the same case, which came before them on a writ of error. 1 Term R. 512.

The effect of these English authorities, as sated by MARCY, J., in *Burt v. Place*, ubi supra, is as follows: 'That if it appears by the plaintiff's own declaration that the prosecution, which he

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charges to have been malicious, was before *150 a tribunal having jurisdiction, and was there decided in favor of the plaintiff in that court, nothing appearing to fix on him any unfair means in conducting the suit, the court will regard the judgment in favor of the prosecution satisfactory evidence of probable cause.' In that case the judgment relied upon by the defendant was held not to be conclusive. The reason is stated to be as follows: 'Though the plaintiff admits in his declaration that the suits instituted before the magistrate by the defendant were decided **477 against him, he sufficiently countervails the effect of that admission by alleging that the defendant, well knowing that he had no cause of action, and that the plaintiff had a full defense, prevented the plaintiff from procuring the necessary evidence to make out that defense by causing him 'to be detained a prisoner until the judgments were obtained, and by alleging that the imprisonment was for the very purpose of preventing a defense to the actions.'

Commenting on this case, the court of appeals of Kentucky in *Spring v. Besore*, 12 B. Mon 551, 555, say: 'The principle settled in the case last cited we understand to be that such a judgment will not, in every possible state of case, be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud or other undue means.' That court proceeds to state the rule as follows: 'The correct doctrine on the subject is, in our opinion, that the decree or judgment in giver of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared, and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree, and show that it was obtained by fraud, and, in that case, it is indispensable that such matter should be alleged in the plaintiff's declaration, for unless it be done, as the other facts which have

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to be stated establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and *151 shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree, and the legal deduction of probable cause, it is incumbent upon him to make it appear in his declaration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud, and oppression on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit, and obtained a judgment in his favor.'

The limitations upon the general principle declared in *Burt v. Place*, ubi supra, were followed by the supreme court of *Maine in Witham* v. *Gowen*, 14 Me. 362, and both decisions were referred to in the subsequent case of *Payson* v. *Casweel*, 22 Me. 212, 226, where the court said: 'In these two cases we have instances of exceptions to the general rule, indicative of the general nature of the characteristics which might be expected to attend them; but the rule itself remains unimpaired. If there be a conviction before a magistrate having jurisdiction of the subject-matter, not obtained by undue means, it will be conclusive evidence of probable cause.'

The propriety of this limitation of the rule seems to have been admitted by the supreme judicial court of Massachusetts in *Bacon* v. *Towne*, 4 Dush 217, 236, though in later cases it reiterated the broader rule, as originally stated in *Whitney v. Peckham*, ubi supra. *Parker v. Huntington*, 7 Gray, 36.

This seems to reconcile the apparent contradiction in the

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authorities, and states the rule, which we think to be well grounded in reason, fair and just to both parties, and consistent with the principle on which the action for malicious prosecution is founded.

It is perhaps, not material in this case to define the rule with precision, and to attempt to state with accuracy the precise effect to be given to a judgment or decree of the court as proof of probable cause under all circumstances, because in the present case the decree of the circuit court of the United States was adjudged to be entitled to no effect whatever as evidence in support of the defense of the plaintiff in error. *152 The ground on which the supreme court of Louisiana proceeded, as stated in its opinion, is explained to be as follows:

Shortly after the adoption of the constitution of 1879, the plaintiff in error instituted a suit in the stae court of Louisiana, which was finally decided by eh supreme court of the state in **478 *Crescent City*, etc., *Slaughter-house Co., v. City of New Orleands*, 33 La. Ann. 934. The object of the suit was to obtain a writ of injunction 'restraining the city of New Orleans from entertaining any petitions for, and from ever designating anyplace of places for, the landing, yarding, sheltering, or slaughtering any animal or animals intended for human food in the parishes or Orleans, Jefferson, and St. Bernard, other than at eh slaughter-houses and premises of the petitioner, and above the United States barracks on the east or left bank of the Mississippi river, and above the depot of Morgan's Louisisana & Texas Railroad, on the west or right bank or side of the Mississippi river.' There was a judgment dismissing the plaintiff's suit, and dissolving the injunction provisionally granted, from which the plaintiff appealed to the supreme court of Louisiana. That court affirmed the judgment, holding that the articles of the new constitution had destroyed the monopoly

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claimed by the plaintiff, and that this was a valid exercise of power on the part of the state of Louisiana, not in violation of any provision of the constitution of the United States. Speaking of the action of the present plaintiff in error in bringing that suit, the supreme court of Louisiana, in its opinion in the present case, (37 La. Ann. 874, 876,) says: 'The questions involved were serious and important. Defendant's right to assert judicially the validity of his contract, and to resist by all legal remedies the execution of any state law which impaired it, was unquestioned. The question involved was federal in its nature, and the courts of the state, and perhaps of the United States, were equally open to it for the vindication of its alleged right; and, in either forum, it was entitled to appeal to the supreme court of the United States for the final and conclusive settlement of the question.' And, referring to the judgment in that suit, it also says: 'It is important to estimate the scope and effect of *153 this decision. It was an authoritative judicial determination, by a competent court, of questions submitted to it at the instance of the company itself. In denying the rights claimed by the company, and in affirming the right of the city to regulate slaughtering within her limits, and to designate places for the conduct of such business, it necessarily affirmed the right of persons complying with such regulations to transact that business at such places, and denied the right of this company to interfere with them. If there was error in the decision, that error could be corrected by one tribunal only, –the supreme court of the United States. Until the questions involved had been determined differently by that high tribunal, the decision of this court was entitled to be accepted as the law by this litigant. Technical principles of list pendens and res adjudicata might not debar the company from prosecuting another suit against a different party, involving the same subject-matter, but, if such suit rested exclusively upon the assertion of rights which this court had directly determined that the company did not possess, if could find no protection against the charge of

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being a malicious prosecution save in the production of a decision of the supreme court of the United States holding that our opinion was error.'

The following extracts from the same opinion are on the same pont:

'We are bound to hold that there was entire absence of probable cause. The suit involved absolutely nothing bu questions of law. Those identical questions had been submitted to this court by this very prosecutor, in a case precisely analogous, and had been determined against him. It was thus authoritatively advised what the law was. If it was dissatisfied with the opinion, its remedy was clear by appeal to the Unite States Supreme court, and it had actually availed itself of that remedy on a writ of error which was pending and determined when this suit was brought. It must be carefully observed that, though the butchers' Union Company was not technically a party to the suit against the city, the questions of right between it and the Crescent City Company were as directly involved as if had been a party. If the city had the right to *154 regulate slaughtering within her limits, and to designate places for its lawful conduct, obviously persons complying with **479 such regulations had the right to transact the business. If she had not that right, no person could lawfully slaughter elsewhere than at the old company's slaughter-house.***

'But it is claimed that the prosecutor acted under the advice of counsel learned in the law. That is certainly true, and would ordinarily protect. But here the client was in possession of the opinion of this court on the very point in its own case, involving the same subject-matter. It had no need for advice of counsel. That advice was simply that the opinion of this court was error. Counsel had the undoubted right to entertain such opinion, and

advise its client. The only lawful remedy under such advice consisted in an appeal to the Untied States supreme court. If it chose to act otherwise on such advice, it acted at its peril, and can take no protection therefrom. The only lawful action it could take under such advice had already been taken in the writ of error from the United States supreme court. ***

'Nor does the decision of the judges of the circuit court of the United States afford a better shied. They are not vested with authority to review or reverse the decisions of this court. The effect of their action was not only to overrule our opinion, but practically to reverse our decree; for of what avail was the right decreed y us in favor of the city, to regulate slaughtering and to designate places therefor, if persons complying with those regulations could be enjoined by the United States circuit court from conducting the business at such places? It is obvious that the entire subject-matter of the injunction suit was embraced in and disposed of by our decree; and that, though the Butchers' Union Company was not nominally a party, its rights, and those of all persons, to transact the business of slaughtering in this city, being subsidiary to and springing directly from the right of the city, were necessarily involved in and protected by our decree. *** But the ground on which we rest our conclusion on the question of probable cause is that our decree in the suit to which the defendant corporation was a party, was, until reversed, *155 the law to it so far as the subject-matter thereof is concerned; that the prosecution of a suit which had no foundation, except in the assumption that our decree was not law, was without probable cause; and that neither the advice of counsel, nor the opinions of judges of a co-ordinate court that our decree was error, cold furnish any cause whatever for the prosection of such suit.

It is conceded by the supreme court of Louisiana, in this

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opinion, that its prior judgment in the case between the plaintiff in error and the city of New Orleans could not operate as an estoppel upon the principle of res judicata, in the suit which the plaintiff in error brought in the circuit court of the United States, the prosecution of which is charged against it as being malicious because it was between different parties. It is also admitted that the judgment was not a final one, but, by reason of the federal question involved, was subject to review and possible reversal by a writ of error from the supreme court of the United States. The prosecution of such a writ of error, which was in fact actually sued out but subsequently dismissed, is declared by the supreme court of Louisiana to be the only lawful course which the plaintiff in error had a right to pursue. The failure to prosecute that writ of error is charged against the plaintiff in error, so as not only to deprive him of the benefit of the defense of probable cause, but as sufficient proof of malice in the subsequent institution of his suit in the circuit court of the Unite States; and these consequences, in the opinion of the supreme court of Louisiana, are not alleviated by the admitted fact that the plaintiff in error acted under the advice of counsel. Notwithstanding such advice, the client itself, the supreme court of Louisiana declared, was bound at its peril to take notice of its legal rights as defined int hat opinion of the supreme court of the state. It is not shown in the present record on what grounds counsel proceeded in their advice, or the plaintiff in error in failing to prosecute the **480 writ of error from that judgment. It will be observed that the only relief sought in that suit was a writ of injunction against the city of New Orleans from taking the preliminary steps under the ordinances of the city in reference *156 to entertaining petitions, and designating places, for the prosecution of the business of which it claimed to have a monopoly under its charter.

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In a similar case, *Crescent City Live-stock Landing & Slaughter-house Co. v. Police Jury*, decided by the supreme court of Louisiana, (32 La. Ann. 1192,) the plaintiff, who is the plaintiff in error herein, sought to enjoin the defendant from granting permission to any one to establish a slaughter-house in the parish of Jefferson, on the ground that such a grant of authority would be in violation of the exclusive rights given to it under its character, –a case precisely analogous to that between the plaintiff in error and the city of New Orleans, (33 La. Ann. 934) In the case against the police jury of Jefferson parish, the appeal and the petition of the plaintiff were dismissed. In disposing of the case, the court say, (page 1196:) 'The averments of the petition disclose a clear case of prematurity of complaint. It will be time enough for the plaintiff to apply for an injunction, upon a sworn averment of proper facts, if, after the police jury will have passed the resolution of given the permission, some party assumes to act upon that resolution and permission; for the determination of the motion to dismiss an opinion necessarily had to be expressed, not upon the merits, for none as yet exist, but upon the sufficiency of the sworn averment to justify the injunction.'

It might, therefore, on the authority of this decision of the supreme court of Louisiana, be argued that the expression of its opinion in the case of *Crescent city*, etc., *Slaughter-house Co.* v. *City of New Orleans*, 33 La. Ann. 934 was unnecessary to the decision of the cause, and obiter dictum, and, for aught that appears, counsel may have advised that a writ of error to reverse the judgment in the supreme court of the United States would fail on the ground that the record did not disclose the existence of a federal question necessarily to be passed on; for it has been the uniform doctrine of this court that where it appears that the judgment of the state court must be affirmed on other grounds

disclosed in the record, it will not be reversed for an erroneous ruling of the state on a federal question not necessary to the decision of the cause. *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Lowenthal*, 110 U.S. 222; S.C. 3 Sup. Ct. Rep. 638; *Erwin* v. *Lowry*, 7 How. 172; *Gibson* v. *Chouteau*, 8 Wall. 314.

However that may be, we are of the opinion, on other grounds, that the supreme court of Louisiana in this case erred in not giving due effect to the decree in question of the circuit court of the United States. The latter is a co-ordinate to the supreme court of Louisiana in authority, and equal in dignity, being the highest federal court sitting in the state, whose judgments and decrees are final and conclusive, subject only to review and reversal in the supreme court of the United States. In the case in which the decree complained of was pronounced the circuit court did not act without jurisdiction, the subject matter of the suit being a controversy arising under the constitution of the United States. The argument of the counsel for the defendant in error to the contrary, which deduces what the judge of the inferior court in his charge to the jury alleged to be a usurpation of jurisdiction, merely from the fact that it's decree was reversed by this court, could only be true if the general proposition were true that all judgments reversible for error are void for want of jurisdiction. Having jurisdiction of the parties and of the subject- matter of the suit, the judges of the circuit court were bound to declare the law of the case between the parties in light of their own convictions, and under a sense of their official responsibilities, not being under any legal obligation to regard the decision of the supreme court Louisiana upon a question of federal law as controlling by reason of it's authority, whatever respect and deference they might see fit to accord it by way of persuasion**481 and argument. And their judgment or decree, when rendered, is binding and perfect between the parties until reversed, without regard to ant adverse opinion or

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judgment of any court of merely concurrent jurisdiction. It's integrity, it's validity, and it's effect are complete in all respects, between all parties in every suit, and in every forum, where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to it's full extent, furnishing a complete protection to all who act in compliance with it's mandate, and, even after reversal, it still remains, as in the case of every other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution, that he had probable cause for his proceeding.

Neither was their anything in the situation or conduct of the plaintiff in error that could deprive it of the protection of the decree of the circuit court of the United States in this action. The fact that it had exercised an election to bring it's suit against the city of New Orleans in the state court could have no legal effect upon it's rights afterwards to bring a similar suit against other parties in the circuit court of the United States. It's right of choice was not exhausted by a single exercise, and justified it in subsequently invoking the jurisdiction of the courts of the United States, no matter what motive or for what purpose. As we have already seen and declared, the existence of express malice, however flagrant or unjustifiable, could not affect the exercise of this right, or deprive the party of the benefit of the judgment of the court as proof of probable cause for the institution of the suit. Neither was the plaintiff in error bound to reject the advice of it's counsel on the ground of it's own presumed knowledge of the law, as declared in the opinion of the supreme court of Louisiana in the prior suit. It had a right to test the soundness of that judgment by seeking the jurisdiction of a co-ordinate court, whose decision would be of equal authority and dignity with that

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of the supreme court of the state, both being final between the parties to the particular litigation until reversed by the supreme court of the United States. The plaintiff in error owed no allegiance to the courts of the states greater than that due to the courts of the United States. It had an equal right in both to vindicate what it claimed to be it's rights, by remedies appropriate to that purpose, and against all parties infringing them. The fact that the supreme court of Louisiana had spoken first gave no additional weight to it's decision. Whatever deference may be due to the decisions of the state of final resort in every case in which it has spoken, and whatever may be the respect to which it's decisions upon questions of purely local law established as rules of property may be entitled, they are not authority binding upon the courts of the United States, sitting even in the same state, where the questions involved and decided relate to rights arising under the constitution and laws of the United States.

But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for it's institution, although subsequently reversed by an appellate tribunal, was not established out any special regard to the person of the party. As we have already seen, it will avail him as a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously, for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy, in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule therefore,**482 has respect to the court and to it's judgment, and not to the parties,

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and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from it's force. It is equally true and equally well settled in the foundations of law that neither misconduct or demerit can be imputed to the court itself. It is an invincible presumption of the law that the judicial tribunal, acting within it's jurisdiction, has acted impartially and honestly. The record of it's proceedings imports verity; it's judgments cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rest largely upon this wholesome principle. That principle has been disregarded in the present case by the supreme court of Louisiana in failing to give due effect to the decree of the circuit court of the United States as sufficient evidence in support of the defense of the plaintiff in error in this action, so far it is an action for the recovery of damages for malicious prosecution.

The judgment of the supreme court of Louisiana on the bond itself, for damages occasioned by its breach, against the principal and surely, is not attacked in this proceeding. It is so far affirmed. But that part which constitutes a judgment against the Crescent City Live-stock Landing & Slaughter-house Company solely, for damages for the malicious prosecution, is reversed, and the cause is remanded for further proceedings therein not inconsistent with this opinion; and it is so ordered.

FN1 9 Fed. Rep. 743.

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